Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TOWLE, DENISON, SMITH & TAVERA, LLP; EDMUND J. TOWLE, III; AND CHARLES G. SMITH,

Petitioners,

v.

UNITED STATES DISTRICT COURT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Supreme Court's decision in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188 (1980), mean that the Court of Appeals has *no power* to review, on a writ of mandamus, a district court's abuse of discretion that violated the Petitioners' constitutional rights?

   a. Should attorneys have a right to appellate review when they are ordered by a district court to work against their will without pay in a civil case?

   (The Federal Circuit, following the Third, Fourth, and Fifth Circuits, held that no appellate review is possible; their decisions are in conflict with the decisions of the Ninth, Eleventh, and First Circuits.)

2. Is it a violation of the Thirteenth Amendment, which prohibits involuntary servitude, and/or is it otherwise improper for the district court to order an attorney to work against his will in defending a civil patent infringement lawsuit where (a) the client refuses to pay and has no means to pay for the defense; (b) the district court, on the eve of trial, stated that the client's insurer has no duty to defend; and (c) the insurer refuses to pay as a result of the district court's holding?

3. Should this Court immediately stay the trial date of August 5, 2003 pending resolution of this petition?

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENTS

Corporate disclosure statements were filed with United States Court of Appeals for the Federal Circuit and there are no amendments to these statements.

I. Parties to the proceeding.

A. Petitioners: Towle, Denison, Smith & Tavera, LLP; Edmund J. Towle, III; and Charles G. Smith;

B. Respondent: United States District Court, Central District of California, United States Magistrate Judge Andrew J. Wistrich;

C. Real Parties In Interest: Aaroflex, Inc.; and 3D Systems, Inc.

II. Representation Statement.

For purposes of this petition, Charles G. Smith represents Petitioners – i.e., Towle, Denison, Smith & Tavera, LLP; Edmund J. Towle, III; and Charles G. Smith. For purposes of the underlying civil patent case (i.e., United States District Court, Central District of California, Case No. CV 97-0231 AJW), Aaroflex is represented by Charles G. Smith; Edmund J. Towle, III; Towle, Denison, Smith & Tavera, LLP; and Neil F. Markva.

III. Corporate Disclosure Statement.

Petitioners are not aware of any parent corporation or publicly held company that owns 10% or more of the stock of any of the parties in this litigation.

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CITATIONS OF ORDERS ENTERED IN THE CASE

In the civil patent infringement case: *3D Systems, Inc. v. Aarotech Laboratories, Inc.*, 160 F.3d 1373, 48 U.S.P.Q.2d 1773 (Fed. Cir. 1998) (affirming in part and reversing in part the district court's order dismissing the litigation for lack of personal jurisdiction).

In the writ of mandamus: *In Re Towle, Denison, Smith & Tavera, LLP*, 2003 WL 173556 (Fed. Cir. 2003) (denying writ of mandamus under *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188 (1980)).

Petitioners were unable to locate any citation for the order by the Ninth Circuit denying the writ for lack of jurisdiction.

CONCISE STATEMENT OF BASIS FOR JURISDICTION IN THIS COURT

(i) The order of the Federal Circuit was entered on January 17, 2003 and the petition is filed under this Court's Rule 11;

(ii) There is no order respecting rehearing or any order granting an extension of time to file the petition for a writ of certiorari;

(iii) There is no cross-petition that applies;

(iv) The statutory provision that confers jurisdiction on this court is 28 U.S.C. § 1254(1); and

(v) Rule 29.4(b) and (c) do not apply.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. The Thirteenth Amendment to the United States Constitution provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

2. The All Writs Act, 28 U.S.C. § 1651(a), provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE AND ARGUMENT

I. INTRODUCTION

A split among the circuits over the interpretation of a United States Supreme Court decision has presented a narrow but important issue here: Does the Federal Circuit have any power to review the district court's denial of a motion to withdraw on a writ of mandamus? Petitioners contend that the Federal Circuit incorrectly interpreted this Court's decision in *Allied Chemical Corp. v. Daiflon,*

Inc., 449 U.S. 33, 101 S.Ct. 188 (1980), to hold that Petitioners have no right of review, even to determine whether Petitioners' constitutional rights were violated by the district court's decision.

This Court should grant this petition in order to resolve the split among the circuits and clarify its decision in *Allied Chemical*. This Court should also clarify the fact that its decision in *Mallard v. United States District Court*, 490 U.S. 296, 109 S.Ct. 1814 (1989) (reversing a court of appeals' denial of a writ of mandamus involving the denial of an attorney's motion to withdraw in a civil case) was intended to permit the court of appeals to review a district court's denial of an attorney's motion to withdraw.

As set forth below, the Petitioners'[1] withdrawal motion was well founded and deserves appellate review.

A. Constitutional Right At Issue

In 1865, the Thirteenth Amendment was added to the United States Constitution abolishing slavery and involuntary servitude. That abolition was circumvented by the district court's October 18, 2002 order requiring lawyers in a five-attorney law firm, to devote substantial time to the continued defense, and eventual trial, of a complex civil patent infringement case without pay.

Despite Petitioners' expressed statement that they could only represent the client in this case as long as the

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[1] The term "Petitioners" stands for the lawyers and law firm seeking a writ: Towle, Denison, Smith & Tavera, LLP; Edmund J. Towle, III; and Charles G. Smith.

client's insurance company continued to fund the defense, despite the fact that the insurance company continued to fund the defense and did not notify the lawyers that it would discontinue the defense until the eve of trial, and despite the client's position that it could not, and would not, pay for the lawyers to continue to defend it, the district court denied the lawyers' motion to withdraw as counsel, apparently on the theory that "substantial sums" had been paid by the insurance carrier in the past to defend the case. Although the vast majority of the insurance payments were to a predecessor law firm and to other lawyers and a substantial unpaid sum is still outstanding to Petitioners, the Court ordered Petitioners to continue defending the case without pay. The effect is to subject the lawyers in this civil action to involuntary servitude, resulting in tremendous financial hardship.

Petitioners presented a writ of mandamus seeking a stay of the trial and a reversal of the district court's order by the United States Court of Appeals for the Federal Circuit; however, the Federal Circuit denied the writ stating that under *Allied Chemical* it did not have the power to review a district court's exercise of discretion on a writ of mandamus.

In this petition for writ of certiorari, Petitioners contend that the refrain that this Court applied to writ reviews in *Allied Chemical* (i.e., "What never? Well, *hardly* ever!" *id.* at 36, 101 S.Ct. at 190) should at least permit the review of a district court's decision to determine whether a petitioner's constitutional rights were violated.

Petitioners therefore respectfully request that this Court order the Federal Circuit to issue the writ of mandamus or at least review the merits of the writ to determine

whether Respondent abused its discretion and/or whether Petitioners' constitutional rights were violated by Respondent's order. Petitioners also respectfully request an immediate stay of the trial, which is currently set for August 5, 2003.

II. STATEMENT OF FACTS

A. Background

Plaintiff and real party in interest 3D Systems, Inc. ("3D") filed a Complaint on January 13, 1997 against defendant and real party in interest Aaroflex, Inc. ("Aaroflex"), among others, in the United States District Court for the Central District of California. (Appendix ("App.") 17, ¶ 3.) On July 28, 2000, the parties consented to the case proceeding for all purposes before U.S. Magistrate Judge Andrew J. Wistrich. (*Id.*)

Aaroflex was initially represented by attorneys of the Los Angeles law firm of Kinsella, Boesch, Fujikawa & Towle ("Kinsella firm"). (*Id.*, ¶ 4.) During the litigation, a partner in the Kinsella firm, Charles G. Smith, took over the primary responsibility for the case. (*Id.*) Aaroflex also was represented by co-counsel Neil Markva, a patent attorney. (*Id.*) Aaroflex's insurance company, Hartford, agreed to defend, subject to a reservation of rights, and was paying the defense expenses as incurred, although on a delayed payment schedule. (*Id.*)

In October 2000, the Kinsella firm ceased to exist as a law firm. (*Id.*, ¶ 5.) Mr. Smith co-founded a new firm named Towle, Denison, Smith & Tavera, LLP ("TDST"), consisting of four attorneys at its inception. (*Id.*) Mr. Smith agreed to continue to represent Aaroflex in this case

on the express condition that Hartford continue to pay defense expenses as incurred. (*Id.*) Mr. Smith advised Hartford that "Mr. Markva and my firm are continuing to represent Aaroflex based on the Hartford's promise to defend Aaroflex under the policy." (*Id.*; App. 14.) Moreover, in an April 11, 2001 letter from Mr. Smith, Mr. Smith stated to Ms. Thompson of Hartford as follows:

> . . . given that our firm is a newly-formed office of four partners, our firm does not have the resources to defend this matter without being paid in a timely manner for the legal costs incurred in the defense of Aaroflex. Therefore, as I stated in our September 7 [sic], 2000[2] letter, my firm is continuing to represent Aaroflex based on Hartford's promise to defend Aaroflex under the policy.

(App. 17, ¶ 5; App. 15, p. 8.)

From its inception, TDST defended Aaroflex and sent bills to Hartford on a monthly basis, which were paid. (App. 17, ¶ 5.) Neither TDST, nor the Kinsella firm, were or are panel counsel selected by Hartford. (*Id.*)

In or about March 6, 2001, Hartford filed a declaratory relief action on insurance coverage against Aaroflex, which also was assigned to Judge Wistrich. (*Id.*) Aaroflex was represented by counsel other than TDST in the declaratory relief action. (*Id.*)

On or about April 22, 2002, the hearing on Hartford's motion for partial summary judgment was held in the

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[2] The correct date is September 5, 2000; see Exhibit 13.

declaratory relief action. (*Id.*, ¶ 7.) To TDST's knowledge, the Court did not issue an order relating to Hartford's partial summary judgment motion, although the Court's comments at the hearing apparently indicated that the Court would hold that Hartford did not have a duty to defend Aaroflex in this case. (*Id.*, ¶ 8.)

Following the April 22, 2002 hearing, Hartford continued to act as if it would pay for the fees and costs of defending this matter through trial. (*Id.*, ¶ 17.) Nothing in Hartford's correspondence hinted that Hartford would stop paying the defense expenses following the April 2002 hearing. (*Id.*) And in a letter dated June 21, 2002 from Ms. Thompson of Hartford, Ms. Thompson stated to Mr. Smith as follows:

> Enclosed please find Hartford's payment in the amount of $14,177.36 for your firm's legal services and expenses reflected in your statements dated April 10, 2002 (Invoice No. 12814) and May 6, 2002 (Invoice No. 12834).

(*Id.* ¶ 17; App. 16.) These payments demonstrated that Hartford continued to pay TDST's bills as late as June 21, 2002. The June 21 payment included TDST's May 6, 2002 invoice, which encompassed fees incurred *after* the April 22 hearing on Hartford's motion for partial summary judgment. In fact, most of the fees incurred for the month of April 2002 were incurred after April 22, 2002. (App. 17, ¶ 17.) Nothing in the June 21, 2002 letter suggested that Hartford was going to discontinue the defense of Aaroflex

or refuse to pay fees and costs that were incurred after April 22, 2002.[3]

In a letter dated July 19, 2002, however, Hartford suddenly advised Aaroflex's counsel in the declaratory relief action, with a "cc" to TDST, that Hartford would no longer fund the defense of this action. (App. 17, ¶ 8; App. 10, Ex. A.) In the July 19, 2002 letter, Hartford took the position that its motion for partial summary judgment on insurance coverage had been granted on April 22, 2002. (App. 10, Ex. A.) Hartford delayed almost three months until July 19, 2002 to give notice of its discontinuance of Aaroflex's defense. (*Id.*)

Through July 2002, TDST was owed approximately $57,000 on this case. (App. 17, ¶ 8.) For the months of August 2002 through January 2003, another $63,000 was incurred, leaving approximately $120,000 unpaid. (*Id.*) Hartford still has not paid those fees and costs incurred by TDST, not even those incurred before its "no-defense" notice to TDST. (*Id.*) The day TDST received notice of Hartford's changed position, the trial was scheduled to begin in less than two months – on October 22, 2002 – with a twelve day trial estimate. (*Id.*) A vast amount of pretrial work had to be done before trial. (*Id.*) TDST promptly reported Hartford's communication to Aaroflex. On August 1, 2002, Aaroflex advised TDST that it could

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[3] Although Ms. Thompson's letter references a right to arbitrate disputes over reimbursement under *Buss v. Superior Court*, 16 Cal.4th 35 (1997), the reference to *Buss* merely repeated its earlier reservation to seek reimbursement of expenses regarding to non-covered claims. (App. 16.) Any reimbursement issue would be between Hartford and its insured, Aaroflex, not between Hartford and Petitioners.

not, and would not, pay TDST's fees. On August 15, 2002, Aaroflex advised TDST that it would oppose a motion to withdraw filed by TDST. Thus, Aaroflex expected TDST to continue to represent it in this case for free. (*Id.*, ¶ 9; App. 9.)

B. The Motion to Withdraw

On or about August 16, 2002, Petitioners filed an *ex parte* application to have its motion to withdraw heard as soon as possible. (App. 17, ¶¶ 10-11.) The Motion To Withdraw was an exhibit to the *ex parte* application, and also was lodged with the Court separately. (Apps. 10-11.) 3D opposed the Motion To Withdraw and the *ex parte* application. (App. 17, ¶ 11.) Co-counsel Neil F. Markva joined the motion to withdraw. (App. 17, ¶ 12; App. 12.) As of the filing of the joinder, Mr. Markva was owed about $147,000 in legal fees and costs. (App. 12, p. 3, ¶ 5.)

Judge Wistrich denied the *ex parte* application. In a minute order dated August 21, 2002, the Court delayed the Motion to Withdraw for hearing until the date of the pretrial conference, September 17, 2002. (App. 17, ¶ 12; App. 6.) Placing the burden of Hartford's belated denial of coverage and Aaroflex's refusal to fund its own defense squarely on the Petitioners, the Court stated:

> **Defendant's counsel** is not excused from being fully prepared to participate in the pretrial conference by the pendency of the motion. Needless to say, the court does not welcome a motion for leave to withdraw as counsel at such a late stage of a case that has been pending as long as this one has. Accordingly, **defendant's counsel**

> should attempt to find another way to address its concerns.

(App. 6 (emphasis added).)

On September 9, 2002, the TDST lawyers filed a supplemental memorandum. (App. 17, ¶ 13; App. 13.) On September 9, 2002, 3D filed a supplemental opposition. (App. 17, ¶ 13.)

The hearing took place on September 17, 2002. At oral argument, the Court stated:

> [G]iven where we are in the case, the late stage of the case, how long the case has been going on, the fact that you have been paid substantial sums for at least most of the work that you've performed up to this point, I feel that I have to deny the motion. I don't have the option of putting your client in the position of proceeding pro se. However, unattractive that may be to the Court, even that option isn't available to us here.

(App. 17, ¶ 14; App. 3.)

Since no minute order was entered on the Court docket sheet or on the internet, and in order to perfect this Petition, TDST submitted an "Order Denying Motion To Withdraw As Counsel," which was signed and filed on October 16, 2002, and entered on October 18, 2002. (App. 17, ¶ 14; App. 2.)

Effectively, the district court's ruling placed the stamp of approval on Hartford's refusal to defend and the client's refusal to pay and has forced Mr. Smith, now one of only five lawyers in TDST, to devote without pay substantially full time to pretrial preparation and, eventually trial, which now is set for August 5, 2003. (App. 17, ¶ 19; App. 5.)

C. TDST's Petition For Writ To Ninth Circuit Was Denied On December 16 for Lack of Jurisdiction

On October 28, 2002, Petitioners filed with the Ninth Circuit a petition for writ of mandamus relating to the motion to withdraw. Petitioners also asked for an immediate stay of trial. (App. 17, ¶ 21.) 3D sent a letter challenging the jurisdiction of the Ninth Circuit and TDST filed a response. 3D then filed a brief in response to the petition and TDST responded. (*Id.*)

On December 16, 2002, more than one and a half months after the petition was filed, the Ninth Circuit dismissed the petition for lack of jurisdiction. (*Id.*; App. 7.)

D. TDST's Petition For Writ To Federal Circuit Was Denied On January 17

On December 23, 2002, Petitioners filed with the Federal Circuit a petition for writ of mandamus. Petitioners also requested an immediate stay of the trial. On January 3, 2003, the Federal Circuit directed 3D to respond to the writ of mandamus by January 13, 2003. (App. 8.)

On January 17, 2003, the Federal Circuit denied the petition for a writ of mandamus, stating that it did not have the power to review a district court's exercise of discretion on a writ of mandamus. (App. 1.)

III. STATUS OF THE UNDERLYING CASE BEFORE THE TRIAL COURT

Prior to filing the initial writ petition on October 28, 2002, the trial had been set for November 5, 2002. On

October 31, 2002, three days after TDST filed the petition with the Ninth Circuit, Judge Wistrich took the trial off-calendar. On November 25, 2002, Judge Wistrich reset the final pretrial conference for February 11, 2002 and the jury trial for February 25, 2003. (App. 17, ¶ 19; App. 4.) The court set aside the final pretrial conference and jury trial dates set in February and, in an order dated March 5, the court reset the jury trial for August 5, 2003. (App. 17, ¶ 19; App. 5.)

IV. ARGUMENT

A. There Is A Split Among The Circuits Regarding Right of Review

Over twenty years ago, in *Allied Chemical*, the United States Supreme Court outlined the standards for review of a writ of mandamus. Since then, the circuit courts of appeals have split as to whether a petitioner can seek review of a district court's order if the district court's order was discretionary. Specifically, the Ninth,[4] Eleventh, and First Circuits have held that a court of appeals can review the district court's order. *In Re Vizcaino*, 173 F.3d 713, 719-20 (9th Cir. 1999) (mandamus allowed to review district court's order revising the class definition); *In Re Smith*, 926 F.2d 1027, 1029-30 (11th Cir. 1991) (mandamus allowed to review district court order declining to approve settlement); *In Re Pearson*, 990 F.2d 653, 656 (1st Cir. 1993) (stating that mandamus may be granted when a

[4] Given that the trial is pending within the geographical borders of the Ninth Circuit, it is ironic that Petitioners would likely have obtained a much different decision, pursuant to *In Re Vizcaino*, had this trial involved any law other than patent law.

district court abused its discretion if the lower court "exceeded its discretion 'to such a degree that its actions amount[ ] to a usurpation of power.'" (quoting *In Re Puerto Rico Electric Power Authority*, 687 F.2d 501, 503 (1st Cir.1982))).

The Third, Fourth, and Fifth Circuits, though, have held that no such review is available. *See, e.g., Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1118 (3d Cir.1986); *In Re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984); and *KMart Corp. v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997).

Accordingly, Petitioners seek a ruling that permits a review by the Federal Circuit of the writ of mandamus on its merits to determine whether Petitioners should be forced to devote substantial and uncompensated resources against their will to defend a corporation in a civil patent suit.

B. The *Mallard* Opinion Strongly Supports The Granting Of A Writ In The Instant Case

The court of appeals should be ordered to review this writ on its merits. Over thirteen years ago, in a case quite similar to the present case, the United States Supreme Court in *Mallard v. United States District Court*, 490 U.S. 296, 109 S.Ct. 1814 (1989), reversed the court of appeals' denial of writ of mandamus arising from an attorney's request to withdraw from a civil case. *Id.* at 308-10, 109 S.Ct. at 1822. In *Mallard*, an attorney was required to represent an indigent inmate in a civil lawsuit. *Id.* at 299-300, 109 S.Ct. at 1817. The attorney's motion to withdraw was denied and the attorney brought a writ of mandamus.

Id. The court of appeals denied the writ of mandamus; however, the United States Supreme Court reversed and remanded, holding that Mallard "was entitled to a writ of mandamus, and the Court of Appeals erred when it denied his application." *Id.* at 310, 109 S.Ct. at 1822-23.

In the present case, the Federal Circuit erred in refusing to consider the writ. Like the writ in *Mallard*, the writ in the instant case sought review of a district court's denial of a motion to withdraw in a civil case. Despite the *Mallard* decision, the Federal Circuit, like the Third, Fourth, and Fifth Circuits, continues to mistakenly construe the language in *Allied Chemical* to mean that courts of appeals are prohibited from reviewing a denial of a motion to withdraw, even to determine whether a petitioner's constitutional rights were violated. This Court should clarify the confusion among the circuits that has persisted for more than a decade. Attorneys in this nation should not be denied the right to appellate review when ordered by a district court to work against their will without pay.

Moreover, as set forth below, all of the facts justifying the granting of a writ of mandamus are present.

C. The District Court's Order Denying Petitioners' Motion To Withdraw As Counsel Is Not Correctable On Appeal

Review by direct appeal in this case is not available. Therefore, Petitioners' right to issuance of a writ is "clear and indisputable." *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 662, 98 S.Ct. 2552, 2557 (1978). The All Writs Act, 28 U.S.C. § 1651(a), provides that "[t]he Supreme Court and all courts established by Act of Congress may

issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Mandamus is available if an order is not appealable because it is not final and does not fall within an exception to the finality doctrine. *See, e.g., Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953-54 (8th Cir.), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1997, 60 L.Ed.2d 376 (1979). Direct appeal is not available in this case because there is no judgment in the underlying case from which to appeal.

Further, an appeal in this situation, even if it were available, would defeat the purpose of the writ. Both Aaroflex and Hartford are refusing to pay the agreed upon attorney fees as well as any future defense expenses. (App. 17, ¶¶ 8-9; App. 11.) The reason for the immediacy of the request to withdraw as counsel is that TDST cannot afford to devote one of its five lawyers, Mr. Smith, to full-time pretrial preparation and trial without any compensation. (App. 11.) A lengthy appeal would only intensify the Petitioners' need for immediate reprieve.

D. Apart From Mandamus, Petitioners Have No Other Direct Means To Vacate The District Court's Order

Petitioners are seeking to withdraw due to Aaroflex's and Hartford's refusal to pay attorney fees and costs. Time and lack of compensation are of direct importance in the Petitioners' request for withdrawal. TDST's small size would make *any* future representation, let alone a trial followed by an appeal, impossible.

E. Judge Wistrich's Order Denying TDST's Motion To Withdraw Is Clearly Erroneous As A Matter Of Law

1. Refusing To Allow TDST To Withdraw As Counsel Would Be Tantamount To Involuntary Servitude

In *United States v. Kozminiski*, 487 U.S. 931, 108 S.Ct. 2751 (1988), the United States Supreme Court addressed involuntary servitude. In *Kozminiski*, the Court stated that involuntary servitude exists when "the victim had no available choice but to work or be subject to legal sanction." *Id.* at 943, 108 S.Ct. at 2760. "If a person desires to withdraw, and then is forced to remain and perform services against his will, his service is involuntary." *Id.* at 973, 108 S.Ct. at 2775 (jury instruction). In the present case, involuntary servitude exists because the motion was denied. TDST currently has no available choice but to work or be subject to the violation of court order and legal sanctions.

As the court in *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472 (11th Cir. 1991), recognized, denying a motion to withdraw could constitute involuntary servitude. In *Arabian American*, the court affirmed the trial court's granting of a motion to withdraw as counsel. Noting that the attorney's client was not paying the accrued fees and was not willing to pay the fees in the future, the trial court stated "that it would be unconscionable to deny Mirk's motion and that a failure to grant the same would amount to involuntary servitude. . . . " *Id.* at 1476.

In the present case, TDST has not been paid for fees and costs already incurred. (App. 17, ¶¶ 8-9; App. 11.)

Aaroflex and its insurer also have said that they will not pay TDST's defense expenses on a going forward basis, despite the fact that TDST's agreement to represent Aaroflex was dependent on Hartford's continued payment. (*Id.*) Thus, as in *Arabian American*, the district court should have granted TDST's motion to withdraw. It is "clearly erroneous" for the district court to require TDST to continue representing Aaroflex without compensation thereby subjecting TDST to involuntary servitude prohibited by the Thirteenth Amendment.

2. Non-Payment Of Attorney Fees Is An Adequate Ground To Withdraw As Counsel

It is black letter law that an attorney may withdraw at any time for a good and sufficient cause and upon reasonable notice. *El Morro Food Distributors, Inc. v. W.M. Tynan & Co.*, 223 F.Supp. 717 (S.D.N.Y. 1963). The court in *People v. Prince*, 268 Cal.App.2d 398, 406-07, 74 Cal.Rptr. 197, 203 (1968) stated:

> It is generally recognized that the failure or refusal of a client to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so will furnish grounds for the attorney to withdraw from the case. (7 C.J.S. Attorney and Client § 110, p. 943; 7 Am.Jur.2d, Attorneys at Law, § 144, p. 134.) Canon 44 of the American Bar Association recognizes that an attorney may be warranted in withdrawing from employment after notice to the client if the client "deliberately disregards an agreement or obligation as to fees or expenses."

See also Darby v. City of Torrance, 810 F.Supp. 275, 276 (C.D. Cal. 1992); *Lindsey v. Admiral Insurance Co.*, 804 F. Supp. 47, 52 (N.D. Cal. 1992) (motion to withdraw proper where "there is a fundamental disagreement between counsel and defendants on matters of strategy, tactics, authority and mutual obligations, such that counsel cannot continue to represent defendants in this action").

In the instant case, TDST was owed about $57,000 for services rendered in May, June, and July, 2002 (App. 17, ¶ 8; App. 11) and now is owed over $120,000. (App. 17, ¶ 8.) Aaroflex and Aaroflex's insurer have refused to pay TDST's billing statements on a going-forward basis. (App. 17, ¶¶ 8-9.) Hartford's decision at this late stage to no longer pay TDST's statements has caused this problem. TDST should not be punished because Hartford made its decision now, instead of a year ago. Further, there is no reason why Aaroflex should be entitled to a free defense at TDST's expense. TDST should not be punished because neither Hartford nor Aaroflex will pay TDST's fees.

3. Any Delay In The Trial Is Due To Hartford's Delay, Not Through Any Fault On The Part Of TDST

As set forth above, Hartford's delayed decision to no longer pay Aaroflex's defense expenses has caused the predicament. (App. 11, pp. 10-11 & Ex. A.) TDST is a very small firm and cannot afford to continue to represent Aaroflex in this lawsuit if it is not paid for the services it renders. (App. 17, ¶ 8; App. 11.)

Even assuming *arguendo* that the granting of this motion would result in some delay, TDST's withdrawal is

still warranted because the insurance carrier that funded the defense for years has suddenly ceased to do so, the client has indicated an inability to pay TDST's future fees, and it would be burdensome and inequitable to require TDST to defend this case without pay.

F. The District Court's Error Is Likely To Occur In Other Cases

Though the instant case may be unusual, it is important to set a precedent for relief in a situation where a small law firm is forced into involuntary servitude through no fault of its own. A legal remedy is needed to intervene immediately when such irreparable harm would occur.

G. Judge Wistrich's Order Denying Petitioners' Request Raises Important Legal Issues Of First Impression

There are good policy reasons for granting the Petitioners' relief in the instant circumstances. Small law firms that do not have the resources to absorb court-imposed free legal services should not be forced to face economic peril for clients who pull financing at the last minute and refuse to fund their defense.

CONCLUSION

Three months before the trial date of a hotly contested and quite complex patent lawsuit, Hartford notified its insured, Aaroflex, and its insured's defense counsel that it would no longer pay the defense expenses in the case. Through the month that the notice was given, the

Petitioners were owed about $57,000 in fees and costs and their co-counsel was owed about $147,000. Despite over $200,000 already owed, Hartford refused to pay, not only the future defense expenses, but also those already incurred before notice was given. Moreover, the insured took the position that it could not pay for its continued defense, but that it would oppose any motion to withdraw. Apparently because of the amount of fees and costs paid by Hartford in the past, most of which went to a predecessor law firm and other counsel, the Court denied Petitioners' Motion To Withdraw.

This Petition should issue, the request to stay the February 25, 2003 trial date should be granted, and the district court should be ordered to vacate its order and grant the Petitioners' motion to withdraw. Petitioners respectfully ask that this Court instruct the Federal Circuit to grant the writ or in the alternative to review Petitioners' writ on its merits and that the trial be stayed pending the outcome of this review.

Dated: April 16, 2003

Respectfully submitted,

CHARLES G. SMITH
TOWLE, DENISON, SMITH &
TAVERA, LLP
10866 Wilshire Boulevard,
Suite 500
Los Angeles, California 90024
(310) 446-5445
Attorneys for Petitioners
Edmund J. Towle, III;
Charles G. Smith; and Towle,
Denison, Smith & Tavera, LLP

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APPENDIX 1

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

MISCELLANEOUS DOCKET NO. 720

IN RE TOWLE, DENISON, SMITH & TAVERA, LLP, EDMUND J. TOWLE, and CHARLES G. SMITH,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS

Before LOURIE, BRYSON, and GAJARSA, *Circuit Judges*.

GAJARSA, *Circuit Judge*.

ORDER

(Filed Jan. 17, 2003)

Towle, Denison, Smith & Tavera, LLP et al. (Towle) petition for a writ of mandamus to direct the United States District Court for the Central District of California to (1) vacate its order and grant petitioners' motion to withdraw as counsel and (2) stay the trial currently set for February 25, 2003. 3D Systems, Inc. opposes.

Towle moved to withdraw as counsel for Aaroflex, Inc. based on the grounds that Aaroflex's insurer would no longer fund Aaroflex's defense and Aaroflex, who opposed Towle's withdrawal, was unable to pay Towle's fees. The Magistrate Judge (hereafter the district court), denied Towle's motion to withdraw, explaining:

> You have my sympathy, but this is a risk that, you know, all of who have practiced law are aware of. And given where we are in the case, the late stage of the case, how long the case has been going on, the fact that you [Towle and co-counsel joining in the motion to withdraw] have been paid substantial sums for at least most of the work that you've performed up to this point, I feel that I have to deny the motion. I don't have the option of putting your client in the position of proceeding pro se. However unattractive that may be to the court, even that option isn't available to us here.

The traditional use of the writ of mandamus in aid of appellate jurisdiction, 28 U.S.C. § 1651(a), has been to confine a trial tribunal to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). A party who seeks a writ bears the burden of proving that it has no other means of attaining the relief desired, *Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa*, 490 U.S. 296, 309 (1989), and that the right to issuance of the writ is "clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). "Where a matter is committed to [the trial court's] discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Id.*

Towle states that the issue presented in its petition is whether the district court abused its discretion in forcing Towle to continue its representation of Aaroflex through the impending trial. Thus, Towle concedes that the denial of a motion to withdraw lies squarely within the district court's discretion. *See Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1087 (7th Cir. 1982) ("The grant or

denial of an attorney's motion to withdraw in a civil case is a matter addressed to the discretion of the trial court. . . . "); *see also Whiting v. Lacara*, 187 F.3d 317, 320 (2d Cir. 1999) ("We review a district court's denial of a motion to withdraw only for abuse of discretion."); *Ohntrup v. Firearms Center, Inc.*, 802 F.2d 676, 679 (3d Cir. 1986) (reviewing district court's refusal to grant law firm's motion to withdraw under abuse of discretion standard); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 135 (1st Cir. 1985) (same, quoting *Washington*, 694 F.2d at 1087); *see generally*, 7 Am. Jur. 2d *Attorneys At Law* § 188 (1997) ("The granting of leave to withdraw by the court is generally in the discretion of the court and depends upon such considerations as proximity of the trial date, length of time an action has been pending, and the possibility for the client to obtain other representation." (Footnote omitted.)).

Thus, pursuant to *Allied Chemical*, 449 U.S. at 35, where Towle is clearly challenging the district court's exercise of its discretion, it cannot show that its right to a particular result is clear and indisputable. Therefore, extraordinary relief is not warranted.

Accordingly,

IT IS ORDERED THAT:

The petition for a writ of mandamus is denied.

FOR THE COURT

/s/ Arthur J. Gajarsa
Arthur J. Gajarsa
Circuit Judge

JAN 17 2003
Date

cc: Charles G. Smith, Esq.
Philip J. Graves, Esq.
USDC CD Cal., Judge
USDC CD Cal., Clerk

APPENDIX 2

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

3D SYSTEMS, INC., a California corporation, Plaintiff, vs. AAROFLEX, INC., a West Virginia corporation, Defendant.	CASE NO. 97-0231 AJW **[~~PROPOSED~~] ORDER DENYING MOTION TO WITHDRAW AS COUNSEL** (Filed Oct. 16, 2002) Date: September 17, 2002 Time: 9:00 a.m. Place: Hon. Andrew J. Wistrich Courtroom 690

On September 17, 2002, at 9:00 a.m., in Courtroom 690 of the above-entitled court, Edmund J. Towle, III, Charles G. Smith and Towle, Denison, Smith & Tavera, LLP moved to withdraw as counsel of record for defendant

Aaroflex, Inc. Co-counsel Neil F. Marvka [sic] filed a joinder in said motion.

Having fully considered all moving and opposition papers, and good cause appearing therefore, the motion is denied.

DATED: 10.16.02

/s/ Andrew J. Wistrich
ANDREW J. WISTRICH
U.S. Magistrate Judge

Presented by:

/s/ Charles G. Smith
CHARLES G. SMITH

APPENDIX 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

3D SYSTEMS, INC., Plaintiff, vs. AAROFLEX, INC., Defendant.	CASE NO: CV 97-231-AJW CIVIL Los Angeles, California Tuesday, September 17, 2002 (9:00 a.m.)

TOWLE, DENISON, SMITH AND TAVERA, EDMUND J. TOWLE, III AND CHARLES G. SMITH'S MOTION TO WITHDRAW AS COUNSEL OF RECORD FOR DEFENDANT AAROFLEX, INC.

BEFORE THE HONORABLE ANDREW J. WISTRICH, UNITED STATES MAGISTRATE JUDGE

Appearances:

For the Plaintiff: (See next page)

For the Defendant: (See next page)

[2] APPEARANCES FOR:

Plaintiff: PHILIP J. GRAVES, ESQ.
ROBERT SHORE, ESQ.
RANDY SUNSHINE, ESQ.

Defendant: CHARLES G. SMITH, ESQ.
NEIL MARKVA, ESQ.

Court Recorder: None

Courtroom Deputy: Ysela Benavides

Transcriber: Jennifer Myers
Exceptional Reporting Services
P.O. Box 61850
Houston, Texas 77208
713 670-7774

[3] **Los Angeles, California;**
Tuesday, September 17, 2002

(Entire proceeding recorded; partially transcribed)

THE COURT: Good morning. Why don't we start with the motion by Defendant's counsel to withdraw. And the first party I'd like to hear from on this is, just briefly, Plaintiff's counsel.

Is there anything that you'd like to add to you papers? Have there been any developments? You may go to the lectern.

MR. SUNSHINE: Your Honor, frankly, there have been no further developments that we're aware of that we haven't stated in our papers. The reality is that every civil litigator knows that there is a risk – and the risk increases as the case proceeds – of getting paid.

These folks unfortunately knew in 2000 – unfortunately for this motion, that is – knew in 2000 that the covered claims were being dropped. We told them –

THE COURT: All right. Nothing new then?

MR. SUNSHINE: Nothing new.

THE COURT: All right.

MR. SUNSHINE: Thank you, your Honor.

THE COURT: All right. Let me hear from Mr. Smith and/or Mr. Markva on this point.

MR. SMITH: Thank you, your Honor. For the transcript, that was Mr. Sunshine who just spoke. This is [4] Charles Smith on behalf of Defendant Aaroflex.

The – we don't have – I think we put in our papers the arguments that we intended to make and present before your Honor. The only other point that I would like to make briefly is that there were also letters that we sent to Hartford wherein we stated that we were continuing to represent Aaroflex only because of Hartford's continuing promise to pay our defense expense.

All of the coverage issues were handled by separate counsel between Hartford and separate counsel for Aaroflex. Our office was not part of those. And the letters regarding confirming that we would only continue to represent Hartford as long as Hartford continued to promise to pay those defense expenses and advising them of that, we have copies of those letters. They were replete with attorney-client communications as well. We're happy to produce them in camera or redact them, but we do have them that we can – that can be presented if that's makes a difference to your Honor.

Our position is that we – it was appropriate for us to represent Aaroflex when Hartford said that they would pay all of our defense expenses. At the point when there was a potential for a coverage issue, it did not seem appropriate to move to withdraw at that point. When Hartford is paying all of our bills and we are – have been representing them for several years, it doesn't seem appropriate to bring a [5] Motion to Withdraw on the potential that Hartford may change its mind in the future.

And the first notice that we had that Hartford was changing its position was when we received their letter July 25th. At that point we promptly requested to be withdrawn, and I think all of that's set out in our papers.

THE COURT: All right. So no new developments then.

MR. SMITH: No.

THE COURT: All right.

MR. SMITH: And –

THE COURT: For example, your client hasn't obtained other counsel who's ready to step in and taken [sic] your place.

MR. SMITH: Correct. I should mention that, that our counsel is – we have had no communications with Aaroflex in the last few weeks. They have indicated they cannot pay. Every indication shows that their statement is truthful, that they don't have the means to continue to pay.

Hartford has not made any statement one way or the other as to a change in their position, so I can only take that their position is firm, that they – their letter of July 25th stands. So we're faced with, if we're ordered to stay, to continue to work in this case without anyone agreeing to pay our fees.

THE COURT: All right. Where would that leave the case? I mean, as I understand it – because your client cannot appear pro se. That's not an option. We'd –

[6] **MR. SMITH:** Right.

THE COURT: – come to a dead halt, wouldn't we?

MR. SMITH: Right. I don't – I think it's correct. Our – my client cannot – as a corporation, cannot appear pro se in this case. If we withdraw and they're unable to find other counsel, I don't see any alternative to a judgment for default being entered against Aaroflex based on its inability to have counsel representing it.

And, I mean, I don't see a solution for Aaroflex that avoids that potential if we're removed from the case.

THE COURT: All right. Now, I take it that since your firm has been in the case it has received some payment, either from Aaroflex or Hartford or both.

MR. SMITH: Yes. In the very beginning of the case, it received payment from Aaroflex. Shortly thereafter – it's received for several years – probably more than five years it's received payment from Hartford exclusively.

THE COURT: What's the approximate total amount that you've been paid for reimbursement of expenses and for attorneys' fees?

MR. SMITH: I don't know that number. One of the complications is the firm that I currently work for has only been in existence since October of 2000, so that – I don't know what that number is. I'm not even sure what the total number is. I know that we're – our firm is currently owed [7] over $60,000 from Hartford based on work –

THE COURT: All right.

MR. SMITH: – going back several months.

THE COURT: Can you give me a reasonable estimate of the amount that you have been paid?

MR. SMITH: I think a reasonable estimate is something between 100 and 150,000, something in that neighborhood. I don't have –

THE COURT: Now, this is since October 2000?

MR. SMITH: Of 2000. Correct.

THE COURT: All right. I see Hartford's counsel raising his hand.

MR. ROBERTS: Well, I just wanted to say that between the two firms I know that the fees are well in excess of $500,000. I don't have any precise numbers today, but I think that it – my belief is that it's closer to 6 or 700,000 and maybe even higher than that.

THE COURT: All right. And that is – when you say "between the two firms," which two firms are you referring to?

MR. ROBERTS: The firm that Mr. Smith was originally affiliated with, his current firm. And then Mr. Markva and his firm have also been paid by Hartsford.

THE COURT: All right. And so your estimate of more than half a million, more like 600 or 700,000 includes all the lawyers that have represented Aaroflex?

[8] **MR. ROBERTS:** That's correct.

THE COURT: Okay.

MR. ROBERTS: And Mr. Markva may be able to shed some light on (indiscernible).

THE COURT: All right. What about that, Mr. Markva? Can you add anything on that?

MR. MARKVA: Yes. I have – I can't give you an exact figure on what has been paid. It has to be around $100,000. I'm – but there's work that I have accomplished, and I billed for it before July 25, which is around $150,000. That still has not yet been paid.

THE COURT: All right. So we're not talking about a situation here where you've been paid nothing. You've been paid a substantial amount over a long period of time. It's just that the prospects for payment for future work seem dim.

MR. SMITH: At best. Yes.

THE COURT: All right. Let me tell you what I'm inclined to do on this. And then, Mr. Smith or Mr. Markva, if you want to be heard further, I'll allow it briefly.

You have my sympathy, but this is a risk that, you know, all of who have practiced law are aware of. And given where we are in the case, the late stage of the case, how long the case has been going on, the fact that you have been paid substantial sums for at least most of the work that you've performed up to this point, I feel that I have to deny the [9] motion. I don't have the option here of putting your client in the position of proceeding pro se. However unattractive that may be to the Court, even that option isn't available to us here.

Either of you wish to be heard?

MR. MARKVA: No.

MR. SMITH: No.

THE COURT: All right. So the Motion to Withdraw is denied.

(Remainder of proceeding recorded)

(End of partial transcript)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Jennifer Myers — 11/7/02
Transcriber — Date

TRANSCRIPT AUTHENTICATED BY:

/s/ Toni Hudson — 11/7/02

TONI HUDSON

FEDERALLY-CERTIFIED TRANSCRIBER

APPENDIX 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No.: CV 97-231-AJW Date: November 25, 2002

Title: 3D SYSTEMS, INC. Vs. AAROFLEX, INC.

PRESENT: ANDREW J. WISTRICH, UNITED STATES MAGISTRATE JUDGE

Ysela Benavides	Not Applicable
Deputy Clerk	Tape No.

ATTORNEYS FOR PLAINTIFFS:	ATTORNEYS FOR DEFENDANTS:

PROCEEDINGS: IN CHAMBERS

Final pretrial conference is scheduled for February 11, 2003, at 10 a.m. Jury trial will commence on February 25, 2003, at 9 a.m.

IT IS SO ORDERED.

cc: Parties

MINUTES FORM II	Initials of Deputy Clerk
CIVIL — GEN	/s/ YB

APPENDIX 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES — GENERAL

Case No. CV 97-0231-AJW Date: March 5, 2003

Title: 3D SYSTEMS, INC. v. AAROFLEX, INC.

PRESENT: HON. ANDREW J. WISTRICH,
MAGISTRATE JUDGE

Ysela Benavides	_____
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

ORDER SCHEDULING TRIAL

Jury trial will commence on August 5, 2003, at 9:00 a.m. Counsel shall contact the clerk no later than July 22, 2003 to make arrangements regarding exhibits, courtroom set up, and the like.

IT IS SO ORDERED.

cc: Parties

Initials of Deputy Clerk
/s/ YB

APPENDIX 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES — GENERAL

Case No. CV 97-0231-AJW Date: August 21, 2002

Title: 3D SYSTEMS, INC. v. AAROFLEX, INC.

PRESENT: HON. ANDREW J. WISTRICH, MAGISTRATE JUDGE

Ysela Benavides
Deputy Clerk

_____
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:
None Present

ATTORNEYS PRESENT FOR DEFENDANT:
None Present

PROCEEDINGS (IN CHAMBERS): ORDER REGARDING MOTION TO WITHDRAW AS COUNSEL AND EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME FOR HEARING ON MOTION

The application of defendant's counsel for an order shortening the time for hearing on its motion to withdraw as counsel for defendant Aaroflex, Inc. is **denied**. The motion will be heard at the pretrial conference. Defendant's counsel is not excused from being fully prepared to participate in the pretrial conference by the pendency of the motion. Needless to say, the court does not welcome a motion for leave to withdraw as counsel at such a late stage of a case that has been pending as long as this one has. Accordingly, defendant's counsel should attempt to find another way to address its concerns. If either party

wishes to file a supplemental brief addressing the substance of the motion to withdraw, such brief must be filed and served no later than September 9, 2002.

IT IS SO ORDERED.

cc: Parties

Initials of Deputy Clerk
/s/ YB

APPENDIX 7

EXHIBIT 19

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: TOWLE, DENISON, SMITH & TAVERA, LLP; et al.	No. 02-73587
TOWLE, DENISON, SMITH & TAVERA, LLP; et al., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, 3D SYSTEMS, INC.; et al., Real Parties in Interest.	DC# CV-97-231-AJW Central District of California (Los Angeles) ORDER (Filed Dec. 16, 2002)

Before: PREGERSON, McKEOWN and FISHER, Circuit Judges

The Clerk shall update the docket to reflect the above caption.

The petition is dismissed for lack of jurisdiction. *See Lights of America, Inc. v. District Court*, 130 F.3d 1369 (9th Cir. 1997) (per curiam).

All other requests for relief are denied as moot.

DISMISSED.

APPENDIX 8

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals
for the Federal Circuit
MISCELLANEOUS DOCKET NO. 720

IN RE TOWLE, DENISON, SMITH & TAVERA, LLP, EDMUND J. TOWLE, and CHARLES G. SMITH,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS

Before GAJARSA, *Circuit Judge*.

ORDER

(Filed Jan. 3, 2003)

Towle, Denison, Smith & Tavera, LLP et al. submit a petition for a writ of mandamus to direct the United States District Court for the Central District of California to (1) vacate its order and grant petitioners' motion to withdraw as counsel and (2) stay the trial currently set for February 25, 2003.

Upon consideration thereof,

IT IS ORDERED THAT:

3D Systems, Inc. is directed to respond within 10 days of the date of filing of this order.

01-03-03
Date

/s/ Arthur J. Gajarsa
Arthur J. Gajarsa
Circuit Judge

cc: Charles G. Smith, Esq.
Philip J. Graves, Esq.
District Judge, USDC CD Cal.
Clerk, USDC CD Cal.

APPENDIX 9

Charlie Smith

From: ayoung [ayoung@aarotec.com]
Sent: Thursday, August 15, 2002 4:53 PM
To: Charlie Smith
Subject: AAROFLEX Vs 3d

Hello Charles,

I do not want you to withdraw from the case until we have won the case at trial. Therefore, I wish to come to LA to object to you withdrawing at this time. I will need about ten days notice to work the trip into my schedule if you will obliege [sic] me I will arrange to come.

Thank you for the advance notice.

Sincerely,

Albert C. Young, jr., PE.
CEO
AAROFLEX, Inc.

APPENDIX 10

EDMUND J. TOWLE, III, California State Bar No. 63030
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Attorneys for Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

3D SYSTEMS, INC., a California corporation, Plaintiff, vs. AAROFLEX, INC., a West Virginia corporation, Defendant.	CASE NO. 97-0231 AJW ***EX PARTE* APPLICATION FOR ORDER SHORTENING TIME FOR HEARING ON MOTION TO WITHDRAW AS COUNSEL OF RECORD; DECLARATION OF CHARLES G. SMITH IN SUPPORT** Date: August 16, 2002 Time: 10:00 a.m. Place: Hon. Andrew J. Wistrich, Courtroom 690

(Filed Aug. 16, 2002)

PLEASE TAKE NOTICE that on August 16, 2002 at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 690, the Courtroom of the Honorable Andrew J. Wistrich, United States Courthouse, 255 E. Temple Street, Los Angeles, California, Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera LLP (collectively, "TDST") will and do hereby apply *ex parte* for an Order Shortening Time To Hear the Motion to Withdraw. A copy of the Motion To Withdraw is attached to this *ex parte* application as Exhibit 3.

This *ex parte* application is made pursuant to the Federal Rules of Civil Procedure and the Local Rules of Practice of this Court to shorten the waiting periods that may apply pursuant to Local Rule 7-19 on the grounds set forth in the attached Memorandum of Points and Authorities.

On July 25, 2002, The Hartford ("Hartford") said it would not continue paying for the defense expenses incurred on behalf of Aaroflex. Aaroflex has said that it could not pay for the defense expenses on a going forward basis. TDST gave Aaroflex three weeks to retain other counsel or find another way to pay for the defense expenses; however, Aaroflex has not done so. Thus, TDST has presented a motion to withdraw. Given that the trial is a little more than two months away, it is important to have this motion heard as soon as possible. Without this *ex parte* relief, the motion would not be heard until about a month before trial.

This application is based upon this Notice, the attached Memorandum of Points and Authorities, the Declaration of Charles G. Smith, and all papers and pleadings on file herein, and on such other oral and

documentary evidence as the Court may receive in support of this application.

PLEASE TAKE FURTHER NOTICE that Aaroflex, co-counsel for Aaroflex, counsel for 3D Systems, Inc. ("3D"), and counsel for Hartford, were all properly notified of this *ex parte* application. On August 15, 2002, TDST sent a letter to Aaroflex, to co-counsel for Aaroflex, counsel for 3D, and to counsel for Hartford, providing each of them with written notice of this *ex parte* application, a copy of which is attached hereto as Exhibit 1.

Dated: August 15, 2002

Respectfully submitted,

CHARLES G. SMITH
TOWLE, DENISON,
SMITH & TAVERA, LLP

By: /s/ Charles G. Smith
Charles G. Smith
Attorneys for Towle,
Denison, Smith &
Tavera, LLP

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT.

This *ex parte* application seeks to shorten the time to hear the motion to withdraw as counsel of record brought by Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP (collectively, "TDST"). A copy of the motion to withdraw is attached as Exhibit 3.

In the instant case, Aaroflex's defense expenses had been paid by Aaroflex's insurer, The Hartford ("Hartford"). Hartford has paid these fees since 1997. On July 25, 2002, Hartford advised Aaroflex that it was withdrawing its

defense of this case. TDST learned shortly thereafter that Aaroflex was not able to pay TDST's fees on a going forward basis. Accordingly, TDST gave Aaroflex notice that it would withdraw as counsel of record in less than three weeks unless Aaroflex either located another attorney to handle the case or found a way to ensure that TDST's fees would be paid. Aaroflex did not respond to TDST's notice. Thus, TDST presented a motion to withdraw as counsel of record. (Declaration of Charles G. Smith ("CGS Decl."), ¶ 3.)

TDST seeks to shorten the time for this hearing in light of the fact that the hearing would take place no earlier than September 9, 2002 (per Local Rule 6-1), barely a week before the pretrial conference order and just 43 days before the trial. (*Id.*, ¶4.)

TDST is seeking to have the motion heard as soon as possible. TDST would like to avoid withdrawing from the case less than a month-and-a-half before trial. TSDT also seeks to avoid performing substantial trial preparation work in the three weeks while this motion would be pending under the standard hearing schedule. Further, in light of the work that needs to be done in preparing this case for trial on the part of Aaroflex, 3D Systems, Inc. ("3D"), and this court, it is in all parties' best interest to have this issue resolved as quickly as possible. (*Id.*, ¶ 5.)

II. TDST GAVE PROPER NOTICE OF THIS *EX PARTE* APPLICATION.

TDST provided sufficient notice of the *ex parte* application under Local Rule 7-19. On August 15, 2002, around 10:00 a.m., TDST faxed a letter to Aaroflex, to co-counsel for Aaroflex, to counsel for 3D, and to counsel for Hartford,

providing each of them with written notice of this *ex parte* application, a copy of which is attached hereto as Exhibit 1. (*Id.*, ¶ 6.)

In response to TDST's notice of the *ex parte* application, counsel for 3D has said that 3D intends to oppose the application. 3D has asked to be present when the application is presented. In addition, Al Young, Aaroflex's president and chief executive officer, sent an e-mail to TDST stating that Aaroflex intended to oppose the motion to withdraw and requested "about ten days notice to work the trip into [his] schedule . . . " (*Id.*, ¶ 7.)

III. CONCLUSION

Since this matter will probably require a significant amount of work on the part of 3D, Aaroflex, and this Court in the next few weeks, this Court should hear the motion to withdraw sooner rather than later. The parties will know where the litigation stands before much of this work has to be done. It is in *all* parties' best interest to have the motion to withdraw determined at the earliest possible opportunity. TDST therefore respectfully requests that this Court grant its *ex parte* application to shorten the time for the hearing on the motion to withdraw.

Dated: August 15, 2002

Respectfully submitted,

EDMUND J. TOWLE, III
CHARLES G. SMITH
TOWLE, DENISON,
SMITH & TAVERA, LLP

By: /s/ Charles G. Smith
Charles G. Smith
Attorneys for Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP

DECLARATION OF CHARLES G. SMITH

1. I, Charles G. Smith, am an attorney duly licensed to practice before all of the courts of the State of California and before all of the United States District Courts for the State of California. I am a member of the law firm Towle, Denison, Smith & Tavera, LLP, counsel for Defendant Aaroflex, Inc. ("Aaroflex"), and one of the attorneys principally responsible for the handling of the captioned matter on behalf of Aaroflex.

2. I make this declaration based upon personal knowledge and, if called as a witness, could and would competently testify hereto. This declaration is being submitted in support of the *Ex Parte* Application for an Order Shortening Time For the Hearing on the Motion To Withdraw As Counsel of Record brought by Edmund J. Towle, III; Charles G. Smith and Towle, Denison, Smith & Tavera, LLP (collectively, "TDST"). A true and correct copy of the motion to withdraw is attached hereto as Exhibit 3.

3. Aaroflex's defense expenses had been paid by Aaroflex's insurer, Hartford. Hartford has paid these fees since 1997. On July 25, 2002, Hartford advised Aaroflex that it was withdrawing its defense of this case. On behalf of TDST, I learned shortly thereafter that Aaroflex was not able to pay TDST's fees on a going forward basis. Accordingly, I gave Aaroflex notice that TDST and I would

withdraw as counsel of record in less than three weeks unless Aaroflex either located another attorney to handle the case or found a way to ensure that TDST's fees would be paid. Aaroflex did not respond to my notice.

4. TDST seeks to shorten the time for this hearing in light of the fact that the hearing would take place no earlier than September 9, 2002 (per Local Rule 6-1), barely a week before the pretrial conference order and just 43 days before the trial.

5. TDST is seeking to have the motion heard as soon as possible. TDST would like to avoid withdrawing from the case less than a month-and-a-half before trial. TSDT also seeks to avoid performing substantial trial preparation work in the three weeks while this motion would be pending under the standard hearing schedule. Further, in light of the work that needs to be done in preparing this case for trial on the part of Aaroflex, 3D Systems, Inc., and this Court, it is in all parties' best interest to have this issue resolved as quickly as possible.

6. On August 15, 2002, at or about 9:50 a.m., I faxed written notice of this *ex parte* application to Philip J. Graves (counsel for 3D Systems, Inc.), Albert C. Young (Chief Executive Officer and President of Aaroflex), Neil F. Markva (co-counsel for Aaroflex), and Todd A. Roberts (counsel for Hartford). The fax confirmation sheets show that the parties received the letter around 10:00 a.m. (except as to Mr. Roberts, whose fax machine was busy). An e-mail attaching the letter was sent to Mr. Roberts around 10:40 a.m. A true and correct copy of my August 15, 2002 letter, with evidence of the parties' receipt of the letter, is attached hereto as Exhibit 1.

7. In response to TDST's notice of the *ex parte* application, Robert Shore, counsel for 3D, has said that 3D intends to oppose the application. Shore said that 3D's counsel would like to be present when the application is presented. In addition, Al Young, Aaroflex's president and chief executive officer, sent an e-mail to TDST stating that Aaroflex intended to oppose the motion to withdraw and requested "about ten days notice to work the trip into [his] schedule. . . . " A true and correct copy of Mr. Young's e-mail is attached hereto as Exhibit 2.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 16th day of August 2002, at Los Angeles, California.

/s/ Charles G. Smith
Charles G. Smith

APPENDIX 11

EDMUND J. TOWLE, III, State Bar No. 63030
CHARLES G. SMITH, State Bar No. 116242
TOWLE, DENISON, SMITH & TAVERA, LLP
10866 Wilshire Boulevard, Suite 500
Los Angeles, California 90024
Telephone: (310) 446-5445
Fax: (310) 446-5447

Attorneys for Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WEST DISTRICT

3D SYSTEMS, INC., Defendant, [sic] vs. AAROFLEX, INC., Defendant.	CASE NO. 97-0231 AJW **NOTICE OF MOTION AND MOTION OF TOWLE, DENISON, SMITH & TAVERA, LLP FOR LEAVE TO WITHDRAW AS COUNSEL FOR AAROFLEX; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION IN SUPPORT** Date: _____, 2002 Time: 10:00 a.m. Place: Courtroom 690, Courtroom of the Honorable Andrew J. Wistrich, Judge Presiding

TO DEFENDANT AAROFLEX, INC. AND TO ALL OTHER PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____, 2002 at 10:00 a.m., or as soon thereafter as Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP (collectively, "TDST") may be heard in Courtroom 690, the Courtroom of the Honorable Andrew J. Wistrich, Judge Presiding, of the above-entitled court, located at 312 North Spring Street, Los Angeles, California 90012, TDST will and do hereby move this Court for leave to withdraw as counsel of record for Defendant Aaroflex, Inc. ("Aaroflex") in connection with this litigation.

This motion is based on the fact that the insurance carrier that had funded the defense of this lawsuit has ceased to do so and Aaroflex has indicated its inability to pay legal fees and costs as incurred, which make it inequitable and burdensome for TDST to continue to represent Aaroflex in this action.

This motion is based on this notice of motion, the accompanying memorandum of points and authorities in support thereof, the Declaration of Charles G. Smith in support thereof, all pleadings, papers and records on file in this action and such argument and evidence that may be presented in support of this motion.

Dated: August 15, 2002

Respectfully submitted,

CHARLES G. SMITH
TOWLE, DENISON,
SMITH & TAVERA
LLP

By: /s/ Charles G. Smith
CHARLES G. SMITH

Attorneys for Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT.

At the inception of this lawsuit in January 1997, Defendant Aaroflex, Inc, ("Aaroflex") retained Kinsella, Boesch, Fujikawa & Towle ("KBFT") to defend Aaroflex in the captioned action. (Declaration of Charles G. Smith ("CGS Decl."), ¶3.) Charles G. Smith was one of the partners in charge of the case. (*Id.*) After Aaroflex retained KBFT, Aaroflex's insurance carrier, The Hartford, agreed to defend the lawsuit. (*Id.*) For over three years, Hartford paid KBFT's legal fees for the defense of Aaroflex in the captioned action.

In October 2000, KBFT ceased to operate as a law firm. Charles G. Smith, two other partners of KBFT, and one "of counsel," to KBFT formed Towle, Denison, Smith & Tavera, LLP. TDST agreed to continue to defend Aaroflex based on the condition that Aaroflex's insurance carrier continue to pay the defense expenses. (*Id.* at ¶5.) for over a year and a half, Hartford has paid TDST's legal fees for the defense of Aaroflex in the captioned action.

Very recently, however, Hartford notified Aaroflex and TDST that it will cease paying the defense expenses in the captioned action. TDST immediately notified

Aaroflex of Hartford's position. Aaroflex has stated that it is unable to pay the defense expenses in the captioned action. No other entity has indicated that it is willing and able to pay these defense expenses. TDST is therefore presenting this motion to withdraw as counsel of record.

II.

NON-PAYMENT OF ATTORNEY FEES IS AN ADEQUATE GROUND TO WITHDRAW AS COUNSEL.

It is well recognized that an attorney who has appeared as the attorney of record in a cause cannot effectively terminate the attorney-client relationship by withdrawing until he or she has made an application to the court and obtained leave to make a formal withdrawal of record. *Anders v. State of California*, 386 U.S. 738, 744 (1967); *Lovvorn v. Johnston*, 118 F.2d 704, 706 (9th Cir.), *cert. denied*, 314 U.S. 607 (1941). Nevertheless, an attorney may withdraw at any time for a good and sufficient cause and upon reasonable notice. *El Morro Food Distributors, Inc. v. W.M. Tynan & Co.*, 223 F.Supp. 717 (S.D.N.Y. 1963).

The court in *People v. Prince*, 268 Cal.App.2d 398, 406-07, 74 Cal.Rptr. 197, 203 (1968) stated:

> It is generally recognized that the failure or refusal of a client to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so will furnish grounds for the attorney to withdraw from the case. (7 C.J.S. Attorney and Client §110, p. 943; 7 Am.Jur.2d, Attorneys at law, § 144, p. 134.) Canon 44 of the

> American Bar Association recognizes that an attorney may be warranted in withdrawing from employment after notice to the client if the client "deliberately disregards an agreement or obligation as to fees or expenses."

See also Darby v. City of Torrance, 810 F.Supp. 275, 276 (C.D. Cal. 1992); *Lindsey v. Admiral Insurance Co.*, 804 F. Supp. 47, 52 (N.D. Cal. 1992) (motion to withdraw proper where "there is a fundamental disagreement between counsel and defendants on matters of strategy, tactics, authority and mutual obligations, such that counsel cannot continue to represent defendants in this action").

III.

TDST'S REQUEST TO WITHDRAW IS WARRANTED

On July 25, 2002, TDST received a letter from Hartford notifying Aaroflex and TDST that Hartford was withdrawing the defense of this case. (CGS Decl., ¶7; Exhibit A.)

The same day, July 25, 2002, Aaroflex advised TDST that Aaroflex is unable to pay TDST's fees and costs on a going forward basis.[1] (CGS Decl., ¶8.) On July 30, 2002, TDST acknowledged to Aaroflex TDST's understanding that Aaroflex would be unable to pay the defense expenses and, based thereon, TDST would have to file a motion to

[1] TDST is concerned that providing any further specifics would invade the attorney-client privilege.

withdraw on or after August 12, 2002. (*Id.*, ¶9; Exhibit B. On July 31, 2002, TDST also advised Aaroflex that if Aaroflex obtained new counsel, TDST would cooperate in the substitution of attorney and smooth transfer of files. (*Id.* ¶9; Exhibit C.) TDST has given Aaroflex more than three weeks to obtain new counsel or find some way to pay TDST's legal fees on a going forward basis. However. Aaroflex has not obtained new counsel and has not provided any assurance that it will pay the defense expenses on a going forward basis. (*Id.*, ¶9.) In letters dated May 3 and August 31, 2002, TDST also notified Aaroflex of the consequences of attempting to appear in pro se, pursuant to the United States District Court, Local Rule 83-2.9 and 83-2.10. (*Id.*, ¶10; Exhibit D.)

The discovery cut-off date in this case has passed and discovery is completed. The pretrial conference is September 17, 2002 and the trial is set for October 22, 2002. Aaroflex has had ample time to obtain new counsel and there is no reason why Aaroflex could not retain new co-counsel, if it so desired, in time to proceed with the trial as scheduled.

As set forth above, TDST is properly seeking leave of court to withdraw. TDST has set forth its reasons in this motion and in its accompanying declaration to warrant TDST's request for leave to withdraw. In addition, TDST is a very small firm. TDST cannot afford to continue to represent Aaroflex in this lawsuit if it is not paid for the services it renders. (CGS Decl., ¶11.)

Even assuming *arguendo* that the granting of this motion would result in some delay, TDST's withdrawal is still warranted because the insurance carrier that funded the defense for years has suddenly ceased to do so. (*id.* ¶7),

the client has indicated an inability to pay TDST's future fees (*id.*, ¶8), and it would be burdensome and inequitable to require TDST to defend this case without pay. (*Id.* ¶10.) As set forth above, the lateness of this request is not due to any tardiness on the part of TDST.

IV.

CONCLUSION.

For the above-stated reasons, TDST respectfully requests that this Court grant its motion for leave to withdraw as counsel of record for Defendant Aaroflex, Inc.

Dated: August 15, 2002

Respectfully submitted,

CHARLES G. SMITH
TOWLE, DENISON,
SMITH & TAVERA
LLP

By: /s/ Charles G. Smith
CHARLES G. SMITH

Attorneys for Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP

DECLARATION OF CHARLES G. SMITH

I, Charles G. Smith, hereby declare and state as follows:

1. I am an attorney admitted to practice in the State of California and in all of the District Courts in the State of California and if called as a witness I could and would

competently testify under oath to the following facts of my own personal knowledge.

2. I am a member of Towle, Denison, Smith & Tavera, LLP, counsel of record for Defendant Aaroflex, Inc. ("Aaroflex") and one of the attorneys chiefly responsible for the handling of this matter.

3. At the inception of this lawsuit in or about January 1997, Aaroflex retained my former law firm, Kinsella, Boesch, Fujikawa & Towle, LLP ("KBFT") to represent it. Except for the initial stages of the lawsuit, I was one of the partners at KBFT in charge of the case. After Aaroflex retained KBFT, Aaroflex's insurance carrier, The Hartford, agreed to defend. For over three years, Hartford paid KBFT's statements for professional services rendered in connection with the defense of Aaroflex in the captioned matter.

4. In October 2000, KBFT ceased to practice law as a law firm. Three of KBFT's partners, including myself, and an "of counsel," of KBFT formed Towle, Denison, Smith & Tavera, LLP. Edmund J. Towle, III; Towle, Denison, Smith & Tavera, LLP; and I (collectively, "TDST") agreed to continue to represent Aaroflex in this lawsuit on the express condition that Aaroflex's insurance carrier continue to pay the defense expenses as incurred. For over a year and a half, Hartford paid TDST's statements for professional services rendered in connection with the defense of Aaroflex in the captioned matter.

5. Neither KBFT nor TDST were or are panel counsel for Hartford.

6. Except at the inception of the lawsuit, all of the bills for legal services and costs incurred on behalf of

Aaroflex have been sent to Hartford. All such bills have been paid by Hartford, except that TDST currently has outstanding bills in the amount of $57,058.39 for time incurred during the months of May, June, and July of 2002.

7. On July 25, 2002, I received a copy of a letter from Linda Thompson, of Hartford, which was dated July 19, 2002 and postmarked July 22, 2002. A true and correct copy of that letter is attached hereto as Exhibit A. In essence, the letter notified Aaroflex that Hartford has withdrawn its defense of this case.

8. Without intending to waive the attorney-client privilege, I have been advised by Aaroflex that it is unable to pay TDST's fees and costs on a going forward basis.

9. On July 30, 2002, I advised Aaroflex of my understanding that Aaroflex would be unable to pay the defense expenses and, based thereon, TDST would file a motion to withdraw on or after August 12, 2002. A true and correct copy of that letter is attached hereto as Exhibit B. On July 31, 2002, I also advised Aaroflex that if Aaroflex obtained new counsel, TDST would cooperate in the substitution of attorney and smooth transfer of files. A true and correct copy of that letter is attached hereto as Exhibit C. As of the filing of this motion, Aaroflex has not obtained new counsel and has not provided any assurance that it will pay TDST's defense expenses on a going forward basis.

10. In letters dated May 3 and August 13, 2002, TDST also notified Aaroflex of the consequences of attempting to appear in pro se, pursuant to the United States District Court, Local Rule 83-2.9 and 83-2.10. A true and correct copy of my letter to Aaroflex dated August 13, 2002 is attached hereto as Exhibit D.

11. TDST has five lawyers and cannot afford to continue to represent Aaroflex in this lawsuit if it is not paid for services rendered. Since Hartford has ceased to fund the defense of Aaroflex and since Aaroflex has indicated it is unable to pay for TDST's future services, I respectfully request that this Motion To Withdraw be granted.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15th day of August 2002, at Los Angeles, California.

/s/ Charles G. Smith

Charles G. Smith

EXHIBIT A

[LOGO]

July 19, 2002

Mr. Gerald Greene
555 W Fifth Street, 13th Floor
Los Angeles, CA 90013

Re: Hartford v. Aaroflex, Inc.

Insured	:	Aarotec Associates Inc.
Claimant	:	3D Systems
Claim No.	:	553 LP 64510
Date of Loss	:	12/10/96

Dear Mr. Greene:

As you are aware, on April 22, 2002, the court granted the motion for partial summary judgment of Hartford

Underwriters and Hartford Casualty Insurance Company thereby ruling that neither company has an obligation to provide a defense to Aaroflex, Inc. from the *3D Systems* action now pending before Judge Wistrich. (C.D. Cal. Case No. 97 0231.)

Under California Law, an insurer may withdraw from defending a claim once it is able to demonstrate, by reference to undisputed facts, that the claim cannot be covered. (*Ringler Associates, Inc. v. Maryland Casualty Company* (2000) 80 Cal.App.4th 1165, 1186-87.) Here, Hartford has demonstrated the claims now asserted by 3D Systems against Aaroflex, Inc. are outside the scope of the insuring agreement and, therefore, Hartford has no contractual duty to continue defending. This letter is intended to notify you that Hartford Underwriters is exercising its right to withdraw from its participation from the defense of this case as of the date of this letter. This means that any additional defense fees and costs incurred on or after the date of the granting of the motion shall be the sole responsibility of Aaroflex.

We also wish to remind you that Hartford intends to enforce its rights of reimbursement as set forth in *Buss v. Superior Court* ((1997) 16 Cal.4th 35, 50). As we have previously explained, Hartford's right of reimbursement encompasses all of Neil Marvka's [sic] bills, and all of the fees and costs incurred by Aaroflex following the filing of 3D Systems' First Amended Complaint in July 2000, which alleged only a single theory of liability under the Patent Act. Finally, Hartford's claim for reimbursement encompasses those fees and costs incurred prior to the filing of the First Amended Complaint that are allocable to the defense of non-covered claims including the one for patent infringement stated in the original complaint, fees

and costs incurred in pursuing affirmative claims for relief or in defending against claims not covered by the policy.

We understand that Judge Wistrich has further stayed Hartford's pending action for reimbursement (C.D. Cal. Case No. CV01-02139 AJW) until the *3d Systems* action is resolved. Once the stay is lifted, Hartford will initiate reimbursement proceedings and claims priority over any judgment obtained by 3D Systems in that action.

We are required under Section 2695.7(b)(3) of the Unfair Claims Settlement Practice Regulations to provide this notice. If you believe your claim has been wrongfully denied or rejected, you also have the right to have the California Department of Insurance review this matter. The Department of Insurance is located at Claims Service Bureau, 300 South Spring Street, 11th Floor, Los Angeles, California 90013, telephone number (213) 987-8921 or (800) 927-4357.

Please contact our attorney Todd A. Roberts of Ropers, Majeski, Kohn & Bentley should you have any comments or questions concerning the terms of this letter or Hartford's position on any of the issues that are presented.

Sincerely,

Linda Thompson

cc: Charlie Smith✓
Neil Marvka [sic]

EXHIBIT B

TOWLE, DENISON, SMITH & TAVERA, LLP
INCLUDING A PROFESSIONAL CORPORATION
LAWYERS
10866 WILSHIRE BOULEVARD, SUITE 500
LOS ANGELES, CALIFORNIA 90084
[Phone Numbers Omitted In Printing]

July 30, 2002

VIA TELECOPY

Albert C. Young, Jr., P.E.
Aaroflex, Inc.
8511 Rixlew Lane
Manassas, VA 20109

Re: *3D Systems, Inc. v. Aaroflex, Inc.*,
United States District Court,
Central District of California, Case No. 97-0231 AJW

Dear Albert:

As you know, on July 25, 2002, we received a copy of a letter from Linda Thompson at the Hartford Insurance Company to Gerald Greene dated July 19, 2002 and postmarked July 22, 2002. We faxed you a copy of Ms. Thompson's letter on July 25, 2002. In the letter, Ms. Thompson said that "Hartford Underwriters is exercising its right to withdraw from its participation from the defense of this case as of the date of this letter."

Given that Hartford has said it will no longer pay for the defense expenses incurred in the captioned action, our firm needs to determine whether Aaroflex or any other person or entity is able to pay the legal expenses that will be incurred in defending the captioned lawsuit through trial.

Earlier this year, we sent you an estimate of the amount of money that it would take to cover the legal fees and costs in defending this matter through trial. That estimate is still valid. From my conversations with Glenda Willoughby, Tim Purnell, and you, it is apparent that Aaroflex does not have the resources to cover even a small portion of this cost. Aaroflex has openly admitted that it is unable to pay our firm's legal fees on a going forward basis.

Please let us know if any individual or entity is willing to pay the remaining legal expenses that our firm needs to defend this case through trial. Unfortunately, given the proximity of the trial date, we do not have a lot of time to wait. Therefore, we will reluctantly file a motion to withdraw as counsel of record if we do not hear from you by August 12, 2002.

If you have any questions, please call.

Very truly yours,

/s/ Charles G. Smith
Charles G. Smith

CGS:cds

cc: Timothy M. Purnell, Esq. (via telecopy)
Neil F. Markva, Esq. (via telecopy)
Gerald Greene, Esq. (via telecopy)

EXHIBIT C

TOWLE, DENISON, SMITH & TAVERA, LLP
INCLUDING A PROFESSIONAL CORPORATION
LAWYERS
10866 WILSHIRE BOULEVARD, SUITE 500
LOS ANGELES, CALIFORNIA 90084
[Phone Numbers Omitted In Printing]

July 31, 2002

VIA TELECOPY

Albert C. Young, Jr., P.E.
Aaroflex, Inc.
8511 Rixlew Lane
Manassas, VA 20109

Re: *3D Systems, Inc. v. Aaroflex, Inc.*,
United States District Court,
Central District of California, Case No. 97-0231 AJW

Dear Albert:

On July 30, 2002, we sent you a letter asking if any individual or entity was willing to pay the remaining legal expenses on behalf of Aaroflex that our firm needs to receive in order to defend this case through trial on a going forward basis. We added that our firm intends to file a motion to withdraw as counsel of record if we do not hear from you by August 12, 2002.

Alternatively, if you are to secure any other attorney or attorneys to handle this matter in our stead, we are more than willing to cooperate with that attorney or those attorneys in the substitution of this matter and in the smooth transition of the files. Please let us know if Aaroflex is able to retain another attorney or attorneys to substitute in as counsel of record in the captioned case. We

still intend, though, to file a motion to withdraw as counsel of record if we do not hear from you by August 12, 2002.

Very truly yours,

/s/ Charles G. Smith
Charles G. Smith

CGS:cds

cc: Timothy M. Purnell, Esq. (via telecopy)
Neil F. Markva, Esq. (via telecopy)
Gerald Greene, Esq. (via telecopy)

EXHIBIT D

TOWLE, DENISON, SMITH & TAVERA, LLP
INCLUDING A PROFESSIONAL CORPORATION
LAWYERS
10866 WILSHIRE BOULEVARD, SUITE 500
LOS ANGELES, CALIFORNIA 90084

[Phone Numbers Omitted In Printing]

August 13, 2002

VIA TELECOPY

Albert C. Young, Jr., P.E.
Aaroflex, Inc.
8511 Rixlew Lane
Manassas, VA 20109

Re: ***3D Systems, Inc. v. Aaroflex, Inc.,***
United States District Court,
Central District of California, Case No. 97-0231 AJW

Dear Albert:

As you know, we are planning to file a motion to withdraw. The motion will probably be filed later this week.

In the meantime, we wanted to advise you again of the consequences of a corporation's inability to appear pro se. Pursuant to Local Rule 83-2.10.1 of the United States District Court, Central District of California ("Local Rule"),

> *Corporation, Unincorporated Association, Partnership or Trust.* A corporation including a limited liability corporation, a partnership including a limited liability partnership, an unincorporated association, or a trust may not appear in any action or proceeding pro se.

Local Rule 83-2.10.3 provides that

> *Compliance With Federal Rules.* Any person appearing pro se will be required to comply with these Local Rules, and with the F.R.Civ.P., F.R.Crim.P., F.R.Evid and F.R. App.P.

Finally, Local Rule 83-2.10.4 states that

> *Sanctions.* Failure to comply with the rules enumerated in L.R. 83-2.10.3 may be ground for dismissal or judgment by default.

Thus, if our firm's motion to withdraw is granted, the court may enter a judgment by default unless Aaroflex is able to retain other counsel to represent it in this action.

Very truly yours,

/s/ Charles G. Smith
Charles G. Smith

CGS:cds

cc: Timothy M. Purnell, Esq. (via telecopy)
Neil F. Markva, Esq. (via telecopy)

APPENDIX 12

NEIL F. MARKVA
LAW OFFICES OF NEIL MARKVA
Springfield Professional Park
8322-A Traford Lane
Springfield, Virginia 22152
Telephone: (703) 644-5000
Facsimile: (703) 644-5755

Attorneys for Neil F. Markva and
Law Offices of Neil F. Markva

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WEST DISTRICT

3D SYSTEMS, INC., Defendant, vs. AAROFLEX, INC., Defendant.	CASE NO. 97-0231 AJW **NEIL F. MARKVA'S JOINDER IN MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR AAROFLEX; DECLARATION IN SUPPORT** (Filed Aug. 20, 2002) Date: _____, 2002 Time: 10:00 a.m. Place: Courtroom 690, Courtroom of the Honorable Andrew J. Wistrich, Judge Presiding

TO DEFENDANT AAROFLEX, INC. AND TO ALL OTHER PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 19, 2002 at 10:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 690, the Courtroom of the Honorable Andrew J. Wistrich, Judge Presiding, of the above-entitled court, located at 312 North Spring Street, Los Angeles, California 90012, Neil F. Markva ("Markva") will and does join in the motion by Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera LLP for leave to withdraw as counsel of record for Defendant Aaroflex, Inc. ("Aaroflex") in connection with this litigation.

This motion is based on the fact that the insurance carrier that had funded the defense of this lawsuit has ceased to do so and Aaroflex has indicated its inability to pay legal fees and costs as incurred, which make it inequitable and burdensome for Markva to continue to represent Aaroflex in this action. In addition, Markva is not admitted to practice in California and does not have offices in this district. Pursuant to Local Rule 83-2.3.3, there must be an attorney with offices in this district to represent Aaroflex. Markva cannot represent Aaroflex if Aaroflex does not have local counsel to represent it.

This motion is based on this notice of motion, the accompanying memorandum of points and authorities in support thereof, the Declaration of Neil F. Markva in support thereof, all pleadings, papers and records on file in this action and such argument and evidence that may be presented in support of this motion.

Dated: August 19, 2002

Respectfully submitted,

NEIL F. MARKVA
LAW OFFICES OF
NEIL MARKVA

By: /s/ Neil F. Markva
NEIL F. MARKVA
Attorneys for Neil F. Markva
and the Law Offices of
Neil Markva

DECLARATION OF NEIL F. MARKVA

I, Neil F. Markva, hereby declare and state as follows:

1. I am an attorney admitted to practice law in Virginia, and if called as a witness I could and would competently testify under oath to the following facts of my own personal knowledge.

2. I am counsel of record for Defendant Aaroflex, Inc. ("Aaroflex") and one of the attorneys chiefly responsible for the handling of this matter.

3. At the inception of this lawsuit in or about January 1997, Aaroflex retained me to represent it. After Aaroflex retained me, Aaroflex's insurance carrier, The Hartford, agreed to defend. For over four years, Hartford paid my statements for professional services rendered in connection with the defense of Aaroflex in the captioned matter.

4. I was not panel counsel for Hartford.

5. Except at the inception of the lawsuit, all of the bills for legal services and costs incurred on behalf of Aaroflex have been sent to Hartford. All such bills have

been paid by Hartford, except that I currently have outstanding bills in the amount of $ 147,853.54 for time incurred during the months of October, 2000 through July, 2002.

6. On July 25, 2002, I received a copy of a letter from Linda Thompson, of Hartford, which was dated July 19, 2002 and postmarked July 22, 2002. In essence, the letter notified Aaroflex that Hartford has withdrawn its defense of this case.

7. Without intending to waive the attorney-client privilege, I have been advised by Aaroflex that it is unable to pay my fees and costs on a going forward basis.

8. I am a solo practitioner and cannot afford to continue to represent Aaroflex in this lawsuit if I am not paid for services rendered. Since Hartford has ceased to fund the defense of Aaroflex and since Aaroflex has indicated it is unable to pay for my future services in this litigation, I respectfully request that this Motion To Withdraw be granted.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 19th day of August 2002, at Fairfax, Virginia.

/s/ Neil F. Markva
Neil F. Markva

APPENDIX 13

EDMUND J. TOWLE, III, State Bar No. 63030
CHARLES G. SMITH, State Bar No. 116242
TOWLE, DENISON, SMITH & TAVERA, LLP
10866 Wilshire Boulevard, Suite 500
Los Angeles, California 90024
Telephone: (310) 446-5445
Fax: (310) 446-5447

Attorneys for Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WEST DISTRICT

3D SYSTEMS, INC., Defendant, vs. AAROFLEX, INC., Defendant.	CASE NO. 97-0231 AJW **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION AND MOTION OF TOWLE, DENISON, SMITH & TAVERA, LLP FOR LEAVE TO WITHDRAW AS COUNSEL FOR AAROFLEX** (Filed Sep. 9, 2002) Date: September 17, 2002 Time: 9:00 a.m. Place: Courtroom 690, Courtroom of the Honorable Andrew J. Wistrich, Judge Presiding

TO DEFENDANT AAROFLEX, INC. AND TO ALL OTHER PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP (collectively, "TDST") present the following supplemental memorandum in support of their motion to withdraw as counsel of record in the captioned action.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT.

Unless TDST's motion is granted, there is little doubt that TDST will be severely punished for something that was entirely out of its control. TDST will potentially have to involuntarily provide legal services without compensation. This situation was caused by the fact that The Hartford, Defendant Aaroflex, Inc.'s ("Aaroflex's") insurer, suddenly withdrew its defense of Aaroflex right before the trial.

A brief review of the facts may be appropriate. In 1997, attorneys at Kinsella, Boesch, Fujikawa & Towle, LLP ("KBFT") agreed to represent Aaroflex. At that time, Aaroflex had the resources to compensate KBFT. Later the same year (1997), Aaroflex's insurer, The Hartford, agreed to pay KBFT's billing statements. In October 2000, KBFT ceased to exist at which point TDST began representing Aaroflex.

At some point while The Hartford was paying KBFT's or TDST's billing statements, Aaroflex's financial situation

worsened to the point where it was not able to pay attorneys' fees in this matter. However, The Hartford continued to pay for all of the defense expenses without interruption. Further, as long as Hartford continued to pay TDST's bills, it would not have been appropriate for TDST to file a motion a [sic] withdraw. In fact, such a motion at that point would have been absurd – a law firm would be asking to withdraw even though its relationship with its client was intact, its bills had been, and its bills were going to be paid in the foreseeable future; the only reason would be because it was possible something could happen in the future that might disrupt that situation.[1] Thus, until The Hartford suddenly announced that it was withdrawing its defense, there was no basis for TDST to withdraw.

Further, TDST's actions following The Hartford's announcement were proper. TDST immediately notified its client of The Hartford's decision and gave its client a reasonable opportunity (three weeks) to arrange financing, locate another attorney, or take other action that would avoid forcing TDST to work without compensation. When Aaroflex was unable to come up with any alternatives besides having TDST work for free, TDST respectfully filed this motion. TDST also immediately brought an *ex parte* application to have this motion heard as soon as possible, which application was denied by this Court.

TDST's motion is also more than reasonable. Both Aaroflex and its insurer have now refused to pay TDST's

[1] In fact, had TDST brought such a motion, TDST might have subjected itself to liability. TDST might be liable for unnecessarily forcing another law firm to familarize itself will all of the complex facts and voluminous documents in this case.

fees and costs on a going forward basis. TDST is already owed $64,474.89 for past legal fees; it has not been paid in several months. Now, with no entity promising to pay TDST's ongoing legal fees, which would include trial preparation and the trial itself, TDST could be required to provide extensive additional legal services against its will and, quite possibly, for no compensation.

Further, if this motion were denied, other questions would arise. Who would pay to have Aaroflex's expert testify? Aaroflex's expert, John MacKrell, resides in Ann Arbor, Michigan; he charges $350.00 per hour plus travel expenses. Unless Mr. MacKrell were assured that he would be fully compensated, it is extremely doubtful that he would agree to travel to Los Angeles and testify.[2]

II.

FORCING TDST TO PROVIDE SERVICES INVOLUNTARILY AND WITHOUT PAY WOULD BE INVOLUNTARY SERVITUDE.

In *United States v. Kozminiski*, 487 U.S. 931, 108 S.Ct. 2751 (1988), the United States Supreme Court addressed involuntary servitude. In *Kozminiski*, the Court stated that involuntary servitude exists when "the victim had no available choice but to work or be subject to legal

[2] No one has suggested that TDST should pay for the expert costs. (As unfair as it would be to force TDST to involuntary provide services without compensation, it would be doubly unfair to order TDST to pay expert fees and costs – all because The Hartford has decided at the eleventh hour to stop paying TDST's billing statements.) Thus, the trial would proceed without him. Yet, Aaroflex's lack of expert testimony would be a significant impediment.

sanction." *Id.* at 943, 108 S.Ct. at 2760. In the present case, involuntary servitude would exist if the motion is denied. TDST would have no available choice but to work or be subject to the violation of court order and legal sanction. Further, the court in *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472 (11th Cir. 1991), stated that denying a motion to withdraw could constitute involuntary servitude. In *Arabian American*, the court affirmed the trial court's granting of a motion to withdraw as counsel. Noting that the attorney's client was not paying the accrued fees and was not willing to pay the fees in the future, the trial court stated

> that it would be unconscionable to deny Mirk's motion and that a failure to grant the same would amount to involuntary servitude. . . .

Id. at 1476.

In the present case, TDST has not been paid for its accrued fees. Aaroflex and its insurer have said that they will not pay TDST's defense expenses on a going forward basis. Thus, as in *Arabian American*, this Court should grant TDST's motion to withdraw. It would be improper to subject TDST to involuntarily work without compensation.

It is black letter law that an attorney may withdraw at any time for a good and sufficient cause and upon reasonable notice. *El Morro Food Distributors, Inc. v. W.M. Tynan & Co.*, 223 F.Supp. 717 (S.D.N.Y. 1963). The court in *People v. Prince*, 268 Cal.App.2d 398, 406-07, 74 Cal.Rptr. 197, 203 (1968) stated:

> It is generally recognized that the failure or refusal of a client to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so will furnish grounds for

> the attorney to withdraw from the case. (7 C.J.S. Attorney and Client §110, p. 943; 7 Am.Jur.2d, Attorneys at Law, § 144, p. 134.) Canon 44 of the American Bar Association recognizes that an attorney may be warranted in withdrawing from employment after notice to the client if the client "deliberately disregards an agreement or obligation as to fees or expenses."

In the instant case, TDST is owed over $64,000. Aaroflex and Aaroflex's insurer have not agreed to pay TDST's billing statements on a going forward basis. The Hartford's decision at this late stage to no longer pay TDST's statements has caused this problem. TDST should not be punished because Hartford made its decision now, instead of a year ago. Further, there is no reason why Aaroflex should be entitled to a free defense at TDST's expense. TDST should not be punished because neither The Hartford nor Aaroflex will agree to pay TDST's fees.

As set forth above, TDST is properly seeking leave of court to withdraw. TDST has set forth ample reasons in its motion to support TDST's request for leave to withdraw. TDST is a very small firm. TDST cannot afford to continue to represent Aaroflex in this lawsuit if it is not paid for the services it renders.

Even assuming *arguendo* that the granting of this motion would result in some delay, TDST's withdrawal is still warranted because the insurance carrier that funded the defense for years has suddenly ceased to do so, the client has indicated an inability to pay TDST's future fees, and it would be burdensome and inequitable to require TDST to defend this case without pay. As set forth above, the lateness of this request is not due to any tardiness on the part of TDST.

III.

CONCLUSION

For the above-stated reasons, TDST respectfully requests that this Court grant its motion for leave to withdraw as counsel of record for Defendant Aaroflex, Inc.

DATED: September 9, 2002 Respectfully submitted,

CHARLES G. SMITH
TOWLE, DENISON,
SMITH & TAVERA, LLP

By: /s/ Charles G. Smith
CHARLES G. SMITH

Attorneys for Edmund J. Towle, III; Charles G. Smith; and Towle, Denison, Smith & Tavera, LLP

APPENDIX 14

KINSELL, BOESCH, FUJIKAWA & TOWLE, LLP
INCLUDING PROFESSIONAL CORPORATIONS
LAWYERS
1901 AVENUE OF THE STARS, SEVENTH FLOOR
LOS ANGELES, CALIFORNIA 90067

[Names and Phone Numbers Omitted In Printing]

September 5, 2000

L2540-001

Linda Thompson
Litigation Consultant
Northern California Commercial Claim Office
Hartford Accident & Indemnity Company
P.O. Box 13827
Sacramento, CA 95823-4827

Re: *3D Systems, Inc. v. Aaroflex, Inc.*,
United States District Court, C.D. Cal., Case No. 97-0231 MRP (Ex)

Hartford Insured:	Aarotech
Hartford Claim No.:	**553-LP 64510**
Claimant:	3D Systems, Inc.
Hartford Policy No.:	72 UUM GK 39386

Dear Linda:

Thank you for your efforts in arranging payment for some of our firm's and Mr. Markva's professional statements for services rendered.

As you know, 3D Systems, Inc. ("3D") recently filed a motion for leave to file a first amended complaint. The first amended complaint alleges one count for patent infringement. Our research shows that the motion may

not be well-taken because it was not filed for a proper purpose. In addition, if the court grants 3D's motion, the defendants may be entitled to recover from 3D some of the attorneys' fees and costs incurred in this action.

Thus, we objected to the motion on the grounds that 3D had a bad faith motive for filing the motion. We also argued that if the motion is granted, the court should order 3D to reimburse Aaroflex for some of the fees and costs incurred in defending the dismissed claims. We added that 3D should also be precluded from refiling the claims that are being deleted. Enclosed is a copy of Aaroflex's opposition to 3D's motion for your review.

In addition, on June 8, 2000, 3D filed an *ex parte* application to continue the pretrial and trial dates established by Judge William M. Byrne on May 16, 2000. Aaroflex informed me that it wanted to object to 3D's *ex parte* request to continue the trial by several months. Therefore, on June 13, 2000, I contacted Judge Mariana R. Pfaelzer's clerk, Robert Flores, and informed him that Aaroflex was planning to oppose 3D's *ex parte* application. Mr. Flores instructed us to file our opposition by the end of the day, which I did, in order to ensure that Judge Pfaelzer would review our opposition when she reviewed 3D's *ex parte* application. Enclosed is a copy of Aaroflex's opposition to the *ex parte* application.

Furthermore, Neil Markva informed me that he and Mr. Roberts had a discussion about certain coverage issues. As you know, Aaroflex would not be able to pay its legal expenses in defense of this matter on its own. Thus, Mr. Markva and my firm are continuing to represent Aaroflex based on the Hartford's promise to defend Aaroflex under the policy.

Very truly yours,

/s/ Charles G. Smith
Charles G. Smith

CGS/cds
Enclosures

cc: Todd A. Roberts, Esq.
Neil F. Markva, Esq.
Edmund J. Towle, III, Esq.
David A. Pash, Esq.
(all without enclosures)

APPENDIX 15

TOWLE, DENISON, SMITH & TAVERA, LLP
INCLUDING A PROFESSIONAL CORPORATION
LAWYERS
10866 WILSHIRE BOULEVARD, SUITE 1270
LOS ANGELES, CALIFORNIA 90024
[Phone Numbers Omitted In Printing]

April 11, 2001

1-2540-001

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION VIA TELECOPY

Linda Thompson
Litigation Consultant
Northern California Commercial Claim Office
Hartford Accident & Indemnity Company
P.O. Box 13827
Sacramento, CA 95853-4827

Dean A. Pappas, Esq.
Ropers, Majeski, Kohn & Bentley
1001 Marshall Street
Redwood City, California 94063

Re: *3D Systems, Inc. v. Aaroflex, Inc.*,
United States District Court, C.D. Cal., Case No. 97-0231 AJW

Hartford Insured:	Aarotech
Hartford Claim No.:	**553-LP 64510**
Claimant:	3D Systems, Inc.
Hartford Policy No.:	72 UUM GK 39386

Dear Linda and Dean:

This letter updates our February 20, 2001 report.

Background

3D Systems, Inc. ("3D") and Aaroflex, Inc. ("Aaroflex") are manufacturers and sellers of rapid prototyping ("RP") equipment. A brief description of an RP machine may be helpful.

* * *

It is my understanding that despite the filing of the declaratory relief action, Hartford has not withdrawn the agreement to defend. Mr. Purnell has discussed coverage matters with Todd A. Roberts of Ropers, Majeski, Kohn & Bentley; hopefully, the discussions will result in some resolution of the coverage dispute that would ensure the defense of this matter through trial. As we have stated before, Aaroflex has indicated that it does not have the resources to continue to defend the captioned action if Hartford were to cease paying for defense expenses. Moreover, given that our firm is a newly-formed office of four partners, our firm does not have the resources to defend this matter without being paid in a timely manner for the legal costs incurred in the defense of Aaroflex. Therefore, as I stated in our September 7, 2000 letter, my firm is continuing to represent Aaroflex based on Hartford's promise to defend Aaroflex under the policy.

My Letter to Ms. Thompson of March 12, 2001.

* * *

Finally, if you would like to review copies of any of the documents referenced in this letter including deposition transcripts, or any other documents in this case,

please let me know. (I can always e-mail you documents that were created by this office in Word® or WordPerfect® to save paper and shipping costs.)

If you have any questions, please call.

Very truly yours,

/s/ Charles G. Smith
Charles G. Smith

CGS/cds
Enclosure

cc: Albert C. Young, Jr., P.E.
Neil F. Markva, Esq.
Edmund J. Towle, Esq.

APPENDIX 16

[LOGO]

June 21, 2002

Charles G. Smith, Esq.
Towle, Denison, Smith & Tavera
10866 Wilshire Boulevard, Suite 500
Los Angeles, CA 90024

Re: Aarotec Associates, Inc.

Insured	:	Aarotec Associates Inc.
Claimant	:	3D Systems
Key Claim No.	:	553 LP 64510
Date of Loss	:	12/10/96

Dear Mr. Smith:

Enclosed please find Hartford's payment in the amount of $14,177.36 for your firm's legal services and expenses reflected on your statements dated April 10, 2002 (Invoice No. 12814) and May 6, 2002 (Invoice No. 12834). Adjustments to the statements are summarized below.

Payment has again been made at a rate of $200 for partners and $150 per hour for associates as Hartford has previously agreed. The enclosed check does not include payment of the "Westlaw" expense ($21.75). Hartford considers on-line legal research expenses as overhead; they will not be reimbursed.

Hartford's payment should not be deemed or construed as a waiver of any of its rights including, but not limited to the right to arbitration pursuant to Civil Code section 2860 or the right to seek reimbursement of attorney's fees and defense costs allocable to non-covered

claims consistent with the Supreme Court's decision in *Buss v. Superior Court* (1997) 16 Cal.4th 35. It remains Hartford's intention to pursue reimbursement of those fees and costs allocable to the defense of the non-covered claims.

If an insured believes its claim has been wrongfully denied or rejected, it has the right to have the California Department of Insurance review this matter. The Department of Insurance is located at Claims Service Bureau, 300 South Spring Street, 11th Floor, Los Angeles, California 90013, telephone number (213) 987-8921 or (800) 927-4357.

Thank you for your attention to this matter. Please feel free to contact me should you have any comments or questions concerning this matter.

Sincerely,

/s/ Linda
Linda Thompson

cc: Timothy Purcell
Todd A. Roberts

APPENDIX 17

Declaration of Charles G. Smith in Support of Writ of Mandamus presented to the United States Court of Appeals for the Federal Circuit

DECLARATION OF CHARLES G. SMITH

I, Charles G. Smith, hereby declare and state as follows:

1. I am an attorney duly admitted to practice in the State of California, before the United States District Court, Central District of California, the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the Federal Circuit, and the United States Supreme Court. If called as a witness, I could and would competently testify under oath to the following facts of my own personal knowledge, except where indicated that it is based on information and belief.

2. Edmund J. Towle, III and I are members of Towle, Denison, Smith & Tavera, LLP, and are counsel of record for defendant and real party in interest Aaroflex, Inc. ("Aaroflex") in *3D Systems, Inc. v. Aaroflex, Inc.*, United States District Court, Central District of California, Case No. 97-0231 AJW ("lawsuit").

3. Plaintiff and real party in interest 3D Systems, Inc. ("3D") filed the Complaint against Aaroflex on or about January 13, 1997. 3D filed a First Amended Complaint on or about July 6, 2000. On or about July 28, 2002, the parties consented to the case proceeding for all purposes before United States Magistrate Judge Andrew J. Wistrich. 3D filed a Second Amended Complaint on August 22, 2000.

4. Aaroflex was initially represented in the lawsuit by attorneys George T. Kliavkoff and Edmund J. Towle, III of the Los Angeles law firm of Kinsella, Boesch, Fujikawa & Towle ("Kinsella firm"). Mr. Kliavkoff was primarily responsible for the case. During the litigation, Mr. Kliavkoff left the Kinsella firm and I, as a partner in the Kinsella law firm at the time, took over the primary responsibility for the case. Aaroflex was also represented by co-counsel Neil Markva, a patent attorney. The insurance company, Hartford, had agreed to defend, subject to a reservation of rights, and was paying the defense expenses as incurred, although on a delayed payment schedule.

5. In October 2000, the Kinsella firm ceased to exist as a law firm. I started a new firm with two other partners of the Kinsella firm and one of counsel. The new firm was named Towle, Denison, Smith & Tavera, LLP ("TDST") and consisted of four attorneys at its inception. I agreed to continue to represent Aaroflex in the lawsuit expressing that I could only do so if Hartford continued to pay defense expenses as incurred. A true and correct copy of this letter is attached hereto as Appendix 14. Moreover, in an April 11, 2001 letter to Ms. Thompson of Hartford, I repeated our position that "my firm is continuing to represent Aaroflex based on Hartford's promise to defend Aaroflex under the policy." A true and correct copy of my April 11, 2001 is attached hereto as Appendix 15. During the next year and a half, TDST continued to defend Aaroflex and send bills to Hartford on a monthly basis, which were paid, again on a delayed payment schedule. Neither TDST, nor the Kinsella firm, were or are panel counsel selected by Hartford.

6. I am informed and believe that in or about March 6, 2001, Hartford filed a declaratory relief action titled

Hartford Underwriter v. Aaroflex, Inc., United States District Court, Central District of California, Case No. CV 01-2139NM (ASWx) on insurance coverage against Aaroflex, which also was assigned to Judge Wistrich. Aaroflex was represented by counsel other than TDST.

7. I am informed and believe that on or about April 22, 2002, the hearing on Hartford's Motion For Summary Judgment in the declaratory relief action was held.

8. Three months after the hearing, on or about July 19, 2002, Hartford advised Aaroflex's counsel in the declaratory relief action, with a "cc" to TDST, that Hartford would no longer fund the defense of the litigation. Through July, 2002, TDST was owed about $57,000 on this case. Hartford still has not paid TDST the fees and costs owed, not even those incurred before its "no-defense" notice to TDST. The trial had been set for October 22, 2002, with a twelve day trial estimate. A tremendous amount of pre-trial and motion work needed to be completed. For the months of August 2002 through January 2003, TDST has incurred an additional $63,000 in fees and costs for a total due and owing of about $120,000. The trial is now set for August 5, 2003.

9. Without intending to waive the attorney-client privilege, on or about August 1, 2002, Aaroflex advised TDST that it could not, and would not, pay TDST's fees. I advised Aaroflex that I would be required to file a motion to withdraw as counsel. On August 15, 2002, I received an email from Albert C. Young, Jr., the Chief Executive Officer of Aaroflex, advising me that he did not want us to withdraw as counsel and that he would object to a motion by TDST to withdraw as counsel. Attached hereto as

Appendix 9 is a true and correct copy of the e-mail from Mr. Young.

10. Attached hereto as Appendix 8 is a true and correct copy of the "*Ex Parte* Application For Order Shortening Time For Hearing On Motion To Withdraw As Counsel Of Record; Declaration Of Charles G. Smith In Support," filed on August 16, 2002.

11. Attached hereto as Appendix 11 is a true and correct copy of the "Notice Of Motion And Motion Of Towle, Denison, Smith & Tavera, LLP For Leave To Withdraw As Counsel For Aaroflex; Memorandum Of Points And Authorities; Declarations And Support," lodged on August 16, 2002. 3D opposed the *ex parte* application.

12. Attached hereto as Appendix 12 is a true and correct copy of "Neil F. Markva's Joinder In Motion For Leave To Withdraw As Counsel For Aaroflex; Declaration In Support," filed on or about August 20, 2002. Judge Wistrich denied the *ex parte* application. In a minute order dated August 21, 2002, the Court set the Motion to Withdraw for a hearing on the date of the pretrial conference, September 17, 2002. A true and correct copy of the August 21, 2002 minute order is attached hereto as Appendix 6.

13. Attached hereto as Appendix 13 is a true and correct copy of the "Supplemental Memorandum In Support Of Motion In Motion Of Towle, Denison, Smith & Tavera, LLP For Leave To Withdraw As Counsel For Aaroflex," filed on September 9, 2002. 3D filed a supplemental opposition on September 9, 2002 as well.

14. On September 17, 2002, I attended the hearing on the Motion To Withdraw. The Motion was denied, apparently because the Court felt that Hartford previously

had paid a lot of money to defend the case. Because no minute order appeared on the Court docket sheet in the PACER System on the internet, I caused an Order to be prepared and submitted to the Court on October 15, 2002. Attached hereto as Appendix 2 is a true and correct copy of the "Order Denying Motion To Withdraw As Counsel," filed on October 16, 2002 and entered on October 18, 2002.

15. Attached hereto as Appendix 14 is a true and correct copy of the letter dated September 5, 2000 that I caused to be sent on that date to Linda Thompson, Litigation Consultant, Northern California Commercial Claim Office, Hartford Accident and Indemnity Company.

16. Attached hereto as Appendix 15 is a true and correct copy (in redacted form) of a letter dated April 11, 2001 that I caused to be sent on that date to Linda Thompson of Hartford Accident and Indemnity Company and Dean A. Pappas, of Ropers, Majeski, Kohn & Bentley, counsel for Hartford.

17. Following the April 22, 2002 hearing, Hartford continued to act as if it would continue to pay for the costs of defending this matter through trial. Attached hereto as Appendix 16 is a true and correct copy of a letter dated June 21, 2002 from Ms. Thompson of Hartford to me, referencing Hartford's payment for my firm's statements dated April 10, 2002 and May 6, 2002. These payments demonstrated that Hartford continued to pay TDST's bills as late as June 21, 2002. The June 21 payment included TDST's May 6, 2002 invoice, which encompassed fees incurred after the April 22 hearing. In fact, most of the fees incurred for the month of April 2002 were incurred after April 22, 2002.

18. I attended the hearing on our Motion To Withdraw As Counsel on September 17, 2002 before the Honorable Andrew J. Wistrich, Magistrate Judge. The hearing was electronically taped and was not taken down by a court reporter. On or about October 16, 2002, I caused my firm to order the tapes of the September 17, 2002 hearing and ordered a transcript of the September 17, 2002, hearing on our Motion To Withdraw as Counsel of Record. On November 8, 2002, we received the transcript, a true and correct copy of which is attached hereto as Appendix 3.

19. Prior to filing the initial writ petition on October 28, 2002, the trial had been set for November 5, 2002. However, on October 31, 2002, three days after TDST filed the petition with the Ninth Circuit, Judge Wistrich took the trial off-calendar. On November 25, 2002, I received by email and fax a minute order titled "Civil Minute – General" dated November 25, 2002 from the Honorable Andrew J. Wistrich, Magistrate Judge. The minute order reset the final pretrial conference for February 11, 2003 at 10:00 a.m. and reset the jury trial for February 25, 2003 at 9:00 a.m. A true and correct copy of the November 25, 2002 minute order is attached hereto as Appendix 4. Judge Wistrich subsequently set aside the final pretrial conference and jury trial dates set in February 2003 and, in a minute order dated March 5, 2003, Judge Wistrich reset the jury trial for August 5, 2003. A true and correct copy of the March 5, 2003 minute order is attached hereto as Appendix 5.

20. On October 28, 2002, Petitioners filed a writ of mandamus with the Ninth Circuit requesting that a writ of mandate issue instructing the trial court to grant the Petitioners' motion to withdraw as counsel in the underlying

action. On October 29, 2002, 3D sent a letter challenging the jurisdiction of the Ninth Circuit. TDST filed a response on November 1, 2002. On November 6, 2002, TDST received 3D's response to the petition ("3D's Brief"). On November 8, 2002, Petitioners' responded to 3D's Brief. On December 16, 2002, more than one-and-a-half months after the petition was filed, the Court of Appeals for the Ninth Circuit issued a written ruling dismissing the petition for lack of jurisdiction. On or about December 18, 2002, I received a copy of an order entered on December 16, 2002 from the Ninth Circuit dismissing the writ for lack of jurisdiction. A true and correct copy of the Ninth Circuit's December 16, 2002 order is attached hereto as Appendix 7.

21. On December 23, 2002, Petitioners filed a writ of mandamus with the Federal Circuit requesting that a writ of mandate issue instructing the trial court to grant the Petitioners' motion to withdraw as counsel in the underlying action. On January 3, 2003, the Federal Circuit directed 3D Systems, Inc. to respond to the writ of mandamus by January 13, 2003. A true and correct copy of the January 3, 2003 order is attached hereto as Appendix 8. On January 17, 2003, the Federal Circuit denied the petition for a writ of mandamus, stating that it did not have the power to review a district court's exercise of discretion on a writ of mandamus. A true and correct copy of the January 17, 2003 Federal Circuit order is attached hereto as Appendix 1.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 10th day of April 2003, at Los Angeles, California.

/s/ Charles G. Smith
Charles G. Smith